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# TETUAN KHANA & CO v. SALING LAU BEE CHIANG & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
IDRUS HARUN JCA
HASNAH MOHAMMED HASHIM JCA
B YEOH WEE SIAM JCA
[CIVIL APPEAL NO: J-02(NCVC)(W)-219-02-2017,
J-02(W)-220-02-2017 & J-02(W)-221-02-2017]
17 JANUARY 2019

C ***CIVIL PROCEDURE:*** *Judgments – Grounds of judgment – Allegation that judge adopted extensive part of one party's submissions as his judgment – Whether judge considered all oral and documentary evidence thoroughly – Whether judge made own analysis of evidence and arrived at findings independently – Whether there was lack of judicial appreciation of facts and law – Whether adoption of one party's*
D *submission could be basis to impugn judgment – Whether judgment valid*

***CIVIL PROCEDURE:*** *Judgments and orders – Appeal against – Grant of orders and declarations which altered, varied and/or amended reliefs sought – Whether inconsistent with primary prayers – Whether judge ought not to have granted varied reliefs*

E

***CIVIL PROCEDURE:*** *Parties – Substitution of – Procedure – Estate in substitution of deceased parties – Whether amended writ and statement of claim served on estate of deceased parties – Whether substitution order served – Whether failure constituted breach of rules of natural justice*

F ***LIMITATION:*** *Accrual of cause of action – Whether action time barred – Cause of action based on breach of trust and constructive trust resulting in misuse, mismanagement and misappropriation of trust fund – Failure by trustees to render audited accounts – Whether continuous cause of action involving running account of subject monies – Whether claim not barred by limitation as long as audited*
G *accounts not rendered – Limitation Act 1953, s. 22(1)(a) & (2)*

***TRUSTS:*** *Duties – Fiduciary duty – Breach by trustees – Cause of action based on breach of trust and constructive trust resulting in misuse, mismanagement and misappropriation of trust fund – Failure to account for trust monies – Whether trustees breached fiduciary duty – Whether liable to reimburse all sums misused,*
H *mismanaged and misappropriated from Trust fund*

***PARTNERSHIP:*** *Liabilities of partners – Legal firm – Firm was constructive trustee of Trust fund disbursed through firm – Failure to account for monies paid into firm's account – Whether partners liable for sums incurred before joining as partner – Whether partners owed fiduciary duty – Whether continuing obligation*
I *until all sums rightfully belonging to Trust paid back – Whether all partners liable for misuse, mismanagement and/or misappropriation from Trust fund – Whether liable to reimburse monies to Trust*

The three appeals herein arose from the High Court Civil Suit No 22-228-2009 ('Suit 228'), namely: (i) Appeal 219, filed by Tetuan Khana & Co ('the fourth defendant'); (ii) Appeal 220, filed by Ramlan bin Adong and 12 others; and (iii) Appeal 221, filed by Dinesh Kanavaji ('Dinesh'). Sometime in the early 1990s, the Johor State Government acquired 53,000 hectares of land in the Linggui Valley, Kota Tinggi District, Johor for the purposes of construction of a dam pursuant to an agreement with the Government of Singapore. The acquisition affected mainly three orang asli villages, Kampung Sayong Pinang, Kampung Semanggar and Kampung Pasir Intan and rendered the orang asli from the villages deprived of the use of their ancestral land and traditional sources of income. In or about 1994, 52 orang asli, on behalf of 424 orang asli from the three villages, appointed Kanawagi of the fourth defendant to initiate a representative action against the Johor State Government *vide* an originating summons ('OS 828'). The High Court gave judgment in favour of the orang asli and ordered that the sum of RM26.5 million be paid as compensation. The appeals by the Johor State Government was dismissed by the Court of Appeal and the Federal Court. Pursuant to an application by the orang asli for the setting up of a trust to manage the compensation monies, the High Court ordered, *inter alia*: (i) the Johor State Government to pay the compensation together with interest accrued amounting to RM38,554,111,92; (ii) the sum of RM22 million from the judgment sum to be paid into a trust account to be established under the name of the Linggiu Valley Orang Asli (Jakuns) Trust ('the Trust'); (iii) a Deed of Trust ('Trust Deed') was declared and sanctioned which stipulates, amongst others, that the duration of the said Trust shall be for a period of 25 years from the date of the Trust Order; (iv) Tok Batin Adong bin Kuwau, Abdul Rahman bin Abdullah and Kanawagi be appointed as the first trustees and who shall execute the Trust Deed; (v) the Director General of Jabatan Hal Ehwal Orang Asli, Malaysia, for the time being, shall be appointed the additional trustee of the Trust; (vi) the balance of compensation sum of RM16,554,111.92 was to be handed to Kanawagi who shall distribute the sum to the 52 orang asli after the deduction of payment of all legal fees, costs, consultation fees and expenses incurred; and (vii) the trustees have liberty to apply in relation to the implementation of the Trust and the performance of their duties under the Trust. The Johor State Government paid the sum of RM22 million to the Trust and the balance sum of RM16,554,111.92 to Tetuan Khana & Co in accordance with the terms of the Trust order. By a court order dated 4 April 2006, Kanawagi and Tetuan Khana & Co were ordered to provide financial statement of the Trust certified by a qualified public accountant. Instead, the defendants, through their solicitors, Messrs Sharifah & Associates, submitted unaudited/uncertified financial statements for years 2000 to 2006 which in essence was in violation of the court order.

The plaintiffs' case, as beneficiaries to the Trust, in Suit 228 was (i) against the defendants, for breach of trust; (ii) against Kanawagi and Tetuan Khana & Co for breach of constructive trust relating to the balance sum of

A RM16,554,111.92; and (iii) against Tok Batin Adong bin Kuwau and Tok Batin Daud bin Kadir ('the two tok Batins), for knowing receipt of the Trust funds. The plaintiffs also contended that the defendants failed, refused and/or neglected to provide and render any information and accounting whatsoever in respect of the Trust and the Trust funds. The scope of Suit 228 B was not limited to only RM16,554,111.92, but covered the sum of RM22 million, and all other sums stated in the prayers for relief, including the other specific sums of payment which the trial judge had ordered under the heading of 'Damages'. On 22 December 2016, the High Court delivered its decision allowing the plaintiffs' claim for reliefs and remedies from the defendants, C including Dinesh, jointly and severally. Hence, the appeals. Kanawagi and his son, Dinesh had also been charged, consequent to a police report by the first plaintiff against the trustees for impropriety in the management of the Trust in 2004, for criminal breach of trust under the Penal Code and for money laundering under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('AMLA'). Both D Kanawagi and Dinesh were acquitted and discharged without their defence being called. In support of the appeal, the defendants submitted, *inter alia*, that: (i) the plaintiffs' claim for accounts from 2000, 2001, 2002 and 2003 was caught by s. 6(2) of the Limitation Act 1953 ('LA'); (ii) the trial judge had overlooked that the order OS 828 was a final order by the previous High E Court which was a competent court of unlimited jurisdiction and therefore the present High Court was prohibited from reopening the case based on the principle of *res judicata*; (iii) the sum of RM16,554,111.92 was disbursed by the fourth defendant, with the consent of the two Tok Batins and Abdul Rahman. The appellants further submitted that the payments were the subject F matter of a criminal case for the offence of criminal breach of trust ('CBT') under s. 409 of the Penal Code and for the offence of money laundering under s. 4(1) of the AMLA against the first defendant and against Dinesh for abetment of the first defendant in one CBT charge, and three AMLA charges in the Sessions Court. However, the first defendant and Dinesh were G acquitted at the end of the prosecution case without the defence being called; (iv) the sum of RM16,554,111.92 had been fully disbursed by 26 August 2008, and therefore the roles of the first and fourth defendants, as solicitors for the orang asli, came to an end, and pursuant to s. 11 and s. 19(1) of the Partnership Act 1961 ('PA'), Dinesh was not liable for all the debts and obligations of the firm regarding the sums which were incurred before he was H a partner; (v) the judgment of the High Court ought to be impugned for the reason that the judgment considered mainly the submissions of the plaintiffs and adopted extensively those submissions as his judgment, without giving due consideration to the evidence and submission of the appellants; and (vi) the High Court had no jurisdiction to grant the reliefs that had not been I specifically pleaded by the plaintiffs. Appeal 220 was by 13 representatives of the estate of the two Tok Batins ('13 appellants') against the whole of the High Court decision dated 22 December 2016. The 13 appellants contended that the two Tok Batins passed away before the commencement of the trial

and the 13 appellants were not parties in the court below and therefore, they did not have the *locus* to appear in this court. The application to substitute the two Tok Batins with their estates in the High Court was dismissed, but, upon appeal, the Court of Appeal granted the order for substitution. Further the 13 appellants were aggrieved by the various orders granted by the court although they were not at the trial of Suit 228. The plaintiffs had failed to produce any proof of service on the representatives of the estate of the two deceased Tok Batins or on the 13 appellants of the substitution order granted by the Court of Appeal.

**Held (allowing Appeal 220; allowing Appeal 219 and Appeal 221 in part)**
**Per Yeoh Wee Siam JCA delivering the judgment of the court:**

**(1)** The plaintiffs' claim was not time-barred by virtue of s. 22(1) and (2) of the LA. Even though the plaintiffs' action was not based on fraud, the cause of action was for breach of trust and constructive trust which resulted in misuse, mismanagement and misappropriation of the Trust funds. Therefore, pursuant to s. 22(1)(a) and (2) of the LA, the plaintiffs' claim was not barred by the limitation of six years. Furthermore, for as long as the audited accounts were not rendered to the plaintiffs, the R&M, and/or the trustee to be appointed by the court, it was a continuing cause of action involving a running account of the subject monies which survived the limitation of six years. (paras 67 & 68)

**(2)** With regard to Appeal 220, upon being granted the substitution order, the plaintiffs were required to serve the order on the estate of the two deceased Tok Batins, which they failed to do. The plaintiffs also had failed to amend the writ and statement of claim, in particular the intitulement, and serve it on the estate of the two deceased Tok Batins. There was also no proof of service of the judgment of the High Court in Suit 228 on the estate of the two deceased Tok Batins or the 13 appellants. Hence, it was a breach of the rules of natural justice for the order dated 22 December 2016 to be made binding on the two Tok Batins whom had passed away, and on their estate who had not been served with the substitution order or the amended writ and amended statement of claim. Therefore, the plaintiffs' claim against the two Tok Batins and/or their estate was dismissed. (paras 40, 41, 44, 51 & 58)

**(3)** The High Court was not varying the Order dated 5 June 2000 in OS 828, but was in fact, giving effect to it to ensure that the Trust monies were kept intact, and not misused, misappropriated or dissipated. The cause of action in Suit 228 was for breach of fiduciary duty of the first trustees, including the constructive trustees, *ie*, the fourth defendant, whereas the cause of action in OS 828 was for the placement of the actual compensation, and the establishment of the Trust, and all matters related thereto. *Res judicata* would, in no way, apply to Suit 228. (para 70)

**(4)** In regard to the sum of RM16,554,111.92, which was the subject matter of the criminal case, the appellants relied heavily on the statement of agreed facts ('SOAF'), which was marked as D234, where the Deputy Public Prosecutor had signed in agreement on the various payments for the legal fees of Dato' R Rajasingam, Dato' RR Sethu and Tetuan Khana & Co, and to Hamzah and his wife and to the two Tok Batins and Abdul Rahman for distribution to the orang asli. However, D234 was merely marked as a SOAF in the criminal court. In the present civil proceedings, D234 should not be marked as an exhibit since its contents were seriously challenged by the plaintiffs. The marking of the SOAF as D234 in the criminal proceedings did not relieve the appellants from the burden of having to prove the truth of the contents of the said document in the present civil proceedings. Pursuant to s. 43 of the Evidence Act 1950 ('EA'), any judgment, order or decree other than those mentioned in ss. 40, 41 and 42 of the EA are irrelevant unless the existence of such judgment, order or decree is a fact in issue or is relevant under some other provision of the EA. (paras 73-76)

**(5)** The fourth defendant was a constructive trustee of all the Trust funds which were disbursed through the firm and therefore, owed a fiduciary duty to the plaintiffs as beneficiaries. Further, the first and fourth defendants, by virtue of them being the solicitors for the plaintiffs in OS 828, owed a fiduciary duty to the 21 plaintiffs therein who formed part of the 52 orang asli. The trial judge stated that the defendants had failed to account for the RM16,554,111.92 which was paid into the fourth defendant's account on or about 13 July 2000. The judge did not err in fact and in law in deciding that the defendants owed a fiduciary duty, whether as trustees or constructive trustees to the Trust and they had breached such fiduciary duty. Therefore, they were liable for all the sums which had been misused, mismanaged and/or misappropriated from the Trust funds and the defendants were liable to reimburse the Trust all such sums. The exact sums payable to the plaintiffs had to be identified and confirmed from the audited accounts. (paras 84 & 99)

**(6)** There was a continuing obligation by the fourth defendant to compensate the plaintiffs for all losses incurred as a result of the firm's refusal and/or failure to account for the RM16,554,111.92. The failure by the firm to account for sums received on behalf of its client in all accounts did not cease to exist by virtue of the incoming or outgoing of an individual. Thus, for as long as the sums which rightfully belonged to the Trust fund were not paid back by the fourth defendant, for as long as the audited accounts were not rendered by the fourth defendant to the plaintiffs, the firm together with its partners,

including Dinesh, were liable for such debts and/or obligations even if Dinesh only joined the firm on 2 January 2004. Thus, as constructive trustees, the firm, including Dinesh, were liable. (paras 115, 117 & 119)

**(7)** The trial judge, having the benefit of hearing all the witnesses and examining all the documents before him in the lengthy trial, which spanned over the period from 1 October 2012 to 23 May 2016, had fully appreciated the facts, the evidence and law. While the judge had adopted chunks of the plaintiffs' submissions in the court below, he had considered all the oral and documentary evidence adduced before him thoroughly and considered both the cases of the plaintiffs and the defendants in totality and in great detail. His Lordship had independently made his own analysis of the evidence, arrived at his own findings and then made his decision and order on each issue for trial based on the law. Although it was not a good practice to copy and/or adopt more of one party's submissions, it could not be the basis to impugn and strike down the whole judgment. There was no lack of judicial appreciation or any judicial misappreciation of the facts and law and therefore the judgment was held to be valid and ought to be preserved. (paras 122 & 123)

**(8)** The trial judge granted orders and declarations which altered, varied and/or amended the reliefs sought, which were different from what were prayed for by the plaintiffs. The order by the judge for payment of various specific sums by various defendants to the plaintiffs was inconsistent with the plaintiffs' primary prayers for audited accounts to be submitted by the defendants. It would therefore be premature for such sums to be paid even before the audited accounts were submitted as there would be a possibility that inaccurate sums of money would be paid. Hence, the trial judge ought not to have granted the varied reliefs. (paras 125, 138 & 139)

**(9)** The court unanimously held, *inter alia*, that: (i) Appeal 220 was allowed with costs; and the decision and Order of the High Court in respect of the second and third defendant and/or their estate were set aside; (ii) Appeal 219 and Appeal 221 were dismissed with costs on liability and allowed in part in respect of reliefs; the orders of the High Court were set aside and substituted accordingly with modifications or exceptions. (para 140)

**(10)** Upon audited accounts submitted to HSBC Trustee or the alternative trustee to be appointed by the court, and where it was found that certain payments were to be made by the first defendant and/or the fourth defendant, upon any demand made by the HSBC Trustee or the alternative trustee to be appointed by the court, for such sums to be paid, the first defendant and/or the fourth defendant were, pursuant to

A the order herein, ordered to pay such sums forthwith to the Trust. Should the court, instead of the reliefs granted by the High Court, order that audited accounts be submitted to HSBC Trustee or the alternative trustee appointed by the court, Dinesh and the fourth defendant would undertake to make all payments found owing or due
B to the Trust. (para 141)

***Bahasa Malaysia*** *Headnotes*

Ketiga-tiga rayuan di sini timbul dari Mahkamah Tinggi Guaman No. 22-228-2009 ('Guaman 228') iaitu: (i) Rayuan 219, difailkan oleh Tetuan
C Khana & Co ('defendan keempat'); (ii) Rayuan 220, difailkan oleh Ramlan bin Adong dan 12 yang lain; dan (iii) Rayuan 221, difailkan oleh Dinesh Kanavaji ('Dinesh'). Kira-kira awal 1990an, Kerajaan Negeri Johor memperoleh 53,000 hektar tanah di Lembah Linggui, Daerah Kota Tinggi, Johor bertujuan untuk pembinaan empangan menurut perjanjian dengan
D Kerajaan Singapura. Pemerolehan itu menjejaskan khususnya tiga perkampungan orang asli, Kampung Sayong Pinang, Kampung Semanggar dan Kampung Pasir Intan dan mengakibatkan orang-orang asli dari kampung-kampung itu kehilangan penggunaan tanah adat dan pendapatan daripada sumber tradisi. Pada atau kira-kira 1994, 52 orang asli, bagi pihak 424 orang asli dari ketiga-tiga kampung itu, melantik Kanawagi dari defendan keempat
E untuk memulakan tindakan wakil terhadap Kerajaan Negeri Johor melalui saman pemula ('OS 828'). Mahkamah Tinggi memberi penghakiman berpihak pada orang asli dan memerintahkan sejumlah RM26.5 juta dibayar sebagai pampasan. Rayuan-rayuan Kerajaan Negeri Johor ditolak oleh Mahkamah Rayuan dan Mahkamah Persekutuan. Berikutan permohonan
F oleh orang-orang asli untuk penubuhan suatu amanah untuk mengurus wang pampasan, Mahkamah Tinggi memerintahkan, antara lain: (i) Kerajaan Negeri Johor membayar pampasan bersama-sama dengan faedah terakru berjumlah RM38,554,111.92; (ii) sejumlah RM22 juta daripada jumlah penghakiman dibayar ke dalam akaun Amanah yang ditubuhkan bawah nama
G Linggiu Valley Orang Asli (Jakuns) Trust ('Amanah'); (iii) Surat Ikatan Amanah diisytiharkan dan diluluskan yang menyatakan, antara lain, tempoh Amanah adalah 25 tahun dari tarikh Perintah Amanah; (iv) Tok Batin Adong bin Kuwau, Tok Batin Abdul Rahman bin Abdullah dan Kanawagi ('defendan keempat') dilantik sebagai pemegang-pemegang amanah pertama dan yang akan menandatangani Surat Ikatan Amanah; (v) Ketua Pengarah
H Jabatan Hal Ehwal Orang Asli, Malaysia, untuk sementara waktu, akan dilantik sebagai pemegang amanah tambahan; (vi) baki wang pampasan RM16,554,111.92 dibayar kepada Kanawagi untuk diagihkan kepada 52 orang asli selepas penolakan bayaran kesemua fi guaman, kos, fi perunding dan perbelanjaan yang dikenakan; dan (vii) pemegang-pemegang
I amanah mempunyai kebebasan untuk memohon berkaitan dengan pelaksanaan Amanah dan pelaksanaan tanggungjawab mereka bawah Amanah. Kerajaan Negeri Johor membayar RM22 juta kepada Amanah dan

baki RM16,554,111.92 kepada Tetuan Khana & Co menurut terma-terma perintah Amanah. Melalui perintah mahkamah bertarikh 4 April 2006, Kanawagi dan Tetuan Khana & Co diperintahkan menyerahkan penyata kewangan Amanah yang diperakui oleh akauntan umum bertauliah. Sebaliknya, defendan-defendan, melalui peguam cara mereka, Tetuan Sharifah & Associates, mengemukakan penyata kewangan tidak beraudit/tidak diperakui untuk tahun 2000 hingga 2006 yang, pada asasnya, bercanggah dengan perintah mahkamah.

Kes plaintif-plaintif, sebagai benefisiari-benefisiari Amanah, dalam Guaman 228 adalah (i) terhadap defendan-defendan, untuk pecah amanah; (ii) terhadap Kanawagi dan Tetuan Khana & Co untuk pecah amanah konstruktif berkaitan dengan baki berjumlah RM16,554,111.92; dan (iii) terhadap Tok Batin Adong bin Kuwau dan Tok Batin Daud bin Kadir ('kedua-dua Tok Batin'), kerana menerima, dengan pengetahuan, dana Amanah tersebut. Plaintif-plaintif juga menghujahkan bahawa defendan-defendan gagal, enggan dan/atau cuai untuk memberi dan mengemukakan apa-apa maklumat dan perakaunan berkaitan dengan Amanah dan dana Amanah. Skop Guaman 228 tidak terhad pada RM16,554,111.92, tetapi meliputi jumlah RM22 juta, dan kesemua jumlah lain yang dinyatakan dalam permohonan untuk relief, termasuk jumlah bayaran spesifik lain yang diperintahkan oleh hakim bicara bawah tajuk 'Damages'. Pada 22 Disember 2016, Mahkamah Tinggi membenarkan tuntutan plaintif-plaintif untuk relief-relief dan remedi-remedi daripada defendan-defendan, termasuk Dinesh, secara bersesama dan berasingan. Dengan itu rayuan-rayuan ini. Kanawagi dan anaknya, Dinesh, juga telah dituduh, berikutan laporan polis oleh plaintif pertama, terhadap pemegang-pemegang amanah atas salah laku dalam pengurusan Amanah dalam tahun 2004, untuk pecah amanah jenayah bawah Kanun Keseksaan dan untuk penggubahan wang bawah Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil Daripada Aktiviti Haram 2001 ('AMLA'). Kedua-duanya, Kanawagi dan Dinesh dilepaskan dan dibebaskan tanpa pembelaan dipanggil. Untuk menyokong rayuan, defendan-defendan menghujahkan, antara lain, bahawa (i) tuntutan plaintif-plaintif untuk akaun-akaun dari tahun 2000, 2001, 2002 dan 2003 terbatas oleh s. 6(2) Akta Had Masa 1953 ('AHM'); (ii) hakim bicara terlepas pandang bahawa perintah OS 828 adalah perintah muktamad oleh Mahkamah Tinggi terdahulu yang adalah mahkamah dengan bidang kuasa kompeten yang tidak terhad dan oleh itu Mahkamah Tinggi ini dilarang membuka semula kes berdasarkan prinsip *res judicata*; (iii) jumlah RM16,554,111.92 diagihkan oleh defendan keempat, dengan persetujuan kedua-dua Tok Batin dan Abdul Rahman. Perayu-perayu selanjutnya menghujahkan bahawa bayaran-bayaran tersebut adalah perkara kes jenayah atas kesalahan pecah amanah bawah s. 409 Kanun Keseksaan dan untuk kesalahan penggubahan wang bawah s. 4(1) AMLA terhadap defendan pertama dan terhadap Dinesh untuk persubahatan dengan defendan pertama dalam satu pertuduhan pecah amanah, dan tiga pertuduhan AMLA

di Mahkamah Sesyen. Walau bagaimanapun, defendan pertama dan Dinesh dilepaskan di akhir kes pendakwaan tanpa pembelaan dipanggil; (iv) jumlah RM16,554,111.92 telah dibayar kesemuanya sebelum 26 Ogos 2008 dan oleh itu, peranan defendan pertama dan keempat, sebagai peguam cara orang asli, tamat, dan menurut s. 11 dan s. 19(1) Akta Perkongsian 1961 ('AP'), Dinesh tidak bertanggungan terhadap kesemua hutang-hutang dan obligasi-obligasi firma itu berkaitan jumlah yang ditanggung sebelum dia menjadi rakan kongsi; (v) penghakiman Mahkamah Tinggi wajar dipersoalkan atas alasan penghakiman itu mempertimbangkan hujahan plaintif-plaintif secara utama dan mengguna pakai kebanyakan hujahan-hujahan tersebut dalam penghakiman, tanpa memberi pertimbangan sewajarnya pada keterangan dan hujahan perayu-perayu; dan (vi) Mahkamah Tinggi tiada bidang kuasa untuk memberi relief-relief yang tidak diplid secara spesifik oleh plaintif-plaintif. Rayuan 220 adalah oleh 13 wakil estet kedua-dua Tok Batin ('13 perayu-perayu') terhadap keseluruhan keputusan Mahkamah Tinggi bertarikh 22 Disember 2016. Kesemua 13 perayu menghujahkan kedua-dua Tok Batin meninggal dunia sebelum perbicaraan bermula dan 13 perayu-perayu bukan pihak di mahkamah di bawah dan oleh itu, mereka tiada *locus* untuk hadir di mahkamah ini. Permohonan untuk mengganti kedua-dua Tok Batin dengan estet mereka di Mahkamah Tinggi ditolak, tetapi, atas rayuan, Mahkamah Rayuan membenarkan perintah penggantian. Selanjutnya, 13 perayu-perayu terkilan dengan berbagai perintah yang diberi mahkamah walaupun mereka tiada dalam perbicaraan Guaman 228. Plaintif-plaintif gagal mengemukakan apa-apa bukti penyerahan perintah penggantian yang diberi Mahkamah Rayuan kepada wakil-wakil estet kedua-dua Tok Batin yang meninggal dunia atau 13 perayu-perayu.

**Diputuskan (membenarkan Rayuan 220; membenarkan sebahagian Rayuan 219 dan Rayuan 221)**

**Oleh Yeoh Wee Siam HMR menyampaikan penghakiman mahkamah:**

**(1)** Tuntutan plaintif-plaintif tidak dihalang masa menurut s. 22(1) dan (2) AHM. Walaupun tindakan plaintif-plaintif tidak berdasarkan fraud, kausa tindakan adalah untuk pecah amanah dan amanah konstruktif yang mengakibatkan salah guna, salah urus dan penyelewengan dana Amanah. Oleh itu, menurut s. 22(1)(a) dan (2) AHM, tuntutan plaintif-plaintif tidak dihalang oleh had masa enam tahun. Tambahan lagi, selagi akaun-akaun beraudit tidak dikemukakan kepada plaintif-plaintif, R&M dan/atau pemegang amanah yang dilantik mahkamah, kausa tindakan adalah berterusan melibatkan akaun berturutan untuk wang tersebut yang melampaui had masa enam tahun.

**(2)** Berkaitan Rayuan 220, selepas pemberian perintah penggantian, plaintif-plaintif perlu menyerahkan perintah tersebut kepada estet kedua-dua Tok Batin yang meninggal dunia, tetapi mereka gagal berbuat demikian. Plaintif-plaintif juga gagal meminda writ dan pernyataan tuntutan khususnya, tajuk dan menyerahkannya kepada

estet kedua-dua Tok Batin yang meninggal dunia. Tiada juga bukti penyerahan penghakiman Mahkamah Tinggi dalam Guaman 228 kepada estet kedua-dua Tok Batin yang meninggal dunia atau 13 perayu-perayu. Oleh itu adalah pelanggaran kaedah-kaedah keadilan semula jadi untuk menjadikan perintah bertarikh 22 Disember 2016 mengikat kedua-dua Tok Batin yang telah pun meninggal dunia, dan atas estet mereka yang tidak pernah diserahkan dengan perintah penggantian atau writ dipinda dan pernyataan tuntutan dipinda. Oleh itu, tuntutan plaintif-plaintif terhadap kedua-dua Tok Batin dan/atau estet mereka ditolak.

**(3)** Mahkamah Tinggi tidak mengubah Perintah bertarikh 5 Jun 2000 dalam OS 828, tetapi sebenarnya, memberi kesan padanya untuk memastikan wang Amanah disimpan dengan selamat, tidak disalah guna, diseleweng atau dilesapkan. Kausa tindakan dalam Guaman 228 adalah untuk pelanggaran kewajipan fidusiari pemegang-pemegang amanah pertama, termasuk pemegang-pemegang amanah konstruktif, iaitu, defendan keempat, sementara kausa tindakan dalam OS 828 adalah untuk meletakkan pampasan sebenar dan penubuhan Amanah, dan kesemua perkara berkaitan dengannya. *Res judicata* tidak terpakai langsung pada Guaman 228.

**(4)** Berkaitan dengan jumlah RM16,554,111.92, yang adalah perkara kes jenayah, perayu-perayu bersandar atas pernyataan fakta-fakta yang dipersetujui ('PFD'), yang ditanda sebagai D234, dan ditandatangani dalam persetujuan oleh Timbalan Pendakwa Raya berkenaan pelbagai bayaran untuk fi guaman oleh Dato' R Rajasingam, Dato' RR Sethu dan Tetuan Khana & Co, dan kepada Hamzah dan isterinya dan kepada dua Tok Batin dan Abdul Rahman untuk diagihkan kepada orang asli. Walau bagaimanapun, D234 hanya ditanda sebagai PFD di mahkamah jenayah. Dalam prosiding sivil di sini, D234 tidak sepatutnya ditanda sebagai ekshibit kerana kandungannya dicabar secara serius oleh plaintif-plaintif. Penandaan PFD sebagai D234 dalam prosiding jenayah tidak melepaskan perayu-perayu daripada beban membuktikan kebenaran kandungan dokumen-dokumen tersebut dalam prosiding sivil ini. Menurut s. 43 Akta Keterangan 1950 ('AK'), mana-mana penghakiman, perintah atau dekri selain daripada yang disebut dalam ss. 40, 41 dan 42 AK tidak relevan kecuali kewujudan penghakiman, perintah atau dekri adalah fakta dalam isu atau relevan bawah peruntukan AK lain.

**(5)** Defendan keempat adalah pemegang amanah konstruktif kesemua dana Amanah yang dibayar melalui firma tersebut dan oleh itu, mempunyai tanggungjawab fidusiari pada plaintif-plaintif sebagai benefisiari-benefisiari. Selanjutnya, defendan pertama dan keempat, dengan menjadi peguam cara plaintif dalam OS 828 mempunyai

tanggungjawab fidusiari kepada 21 plaintif dalam kes itu yang adalah sebahagian daripada 52 orang asli. Hakim bicara menyatakan bahawa defendan-defendan gagal memberi penjelasan untuk jumlah RM16,554,111.92 yang dibayar ke akaun defendan keempat pada atau kira-kira 13 Julai 2000. Hakim tidak terkhilaf dari segi fakta dan undang-undang apabila memutuskan bahawa defendan-defendan mempunyai kewajipan fidusiari, sama ada sebagai pemegang amanah atau pemegang amanah konstruktif dan mereka telah melanggar kewajipan fidusiari tersebut. Oleh itu, mereka bertanggungan untuk kesemua jumlah yang disalah guna, disalah urus dan/atau diseleweng daripada dana Amanah dan defendan-defendan bertanggungan untuk mengembalikan kesemua jumlah tersebut ke dalam Amanah. Jumlah sebenar yang perlu dibayar kepada plaintif-plaintif perlu dikenal pasti dan disahkan daripada akaun-akaun beraudit.

**(6)** Wujud tanggungjawab berterusan oleh defendan keempat untuk memampas plaintif-plaintif untuk kesemua kerugian yang dialami akibat keengganan dan/atau kegagalan firma menjelaskan jumlah RM16,554,111.92. Kegagalan firma untuk menjelaskan jumlah yang diterima bagi pihak anak guamnya dalam kesemua akaun tidak tamat dengan kedatangan atau pemergian seseorang individu. Oleh itu, selagi jumlah yang sepatutnya milik dana Amanah tidak dibayar balik oleh defendan keempat, selagi akaun-akaun beraudit tidak dikemukakan oleh defendan keempat kepada plaintif-plaintif, firma tersebut bersama-sama dengan rakan kongsinya, termasuk Dinesh, bertanggungan untuk hutang-hutang dan/atau kewajipan-kewajipan sedemikian walaupun Dinesh hanya memasuki firma pada 2 Januari 2004. Oleh itu, sebagai pemegang-pemegang amanah konstruktif, firma tersebut, termasuk Dinesh, bertanggungan.

**(7)** Hakim bicara, yang berpeluang mendengar kesemua saksi dan memeriksa kesemua dokumen di hadapan beliau dalam perbicaraan yang panjang, yang berjalan untuk tempoh dari 1 Oktober 2012 hingga 23 Mei 2016, telah mempertimbangkan sepenuhnya fakta-fakta, keterangan dan undang-undang. Walaupun hakim mengguna pakai sebahagian besar hujahan plaintif-plaintif di mahkamah di bawah, beliau telah mempertimbangkan kesemua keterangan lisan dan dokumentar yang dikemukakan dengan teliti dan mempertimbangkan kedua-dua kes plaintif-plaintif dan defendan-defendan secara menyeluruh dan secara terperinci. Yang Arif membuat sendiri analisa keterangan, mencapai dapatannya sendiri dan kemudian membuat keputusan dan perintah atas setiap isu untuk perbicaraan berdasarkan undang-undang, secara persendirian. Walaupun bukan amalan baik untuk meniru dan/atau menggunakan sebahagian besar daripada hujahan sesuatu pihak, itu tidak boleh menjadi asas untuk

mempersoalkan atau membatalkan keseluruhan penghakiman. Tiada kekurangan pertimbangan kehakiman atau salah pertimbangan kehakiman terhadap fakta-fakta dan undang-undang dan oleh itu, penghakiman diputuskan sah dan wajar dikekalkan.

**(8)** Hakim bicara memberi perintah dan deklarasi-deklarasi yang menukar, mengubah dan/atau meminda relief-relief yang dipohon, yang berbeza daripada apa yang dipohon oleh plaintif-plaintif. Perintah hakim untuk bayaran berbagai jumlah spesifik oleh defendan-defendan yang berlainan kepada plaintif-plaintif tidak konsisten dengan permohonan utama plaintif-plaintif untuk akaun-akaun beraudit dikemukakan defendan-defendan. Oleh itu, adalah pra-matang untuk jumlah tersebut dibayar sebelum akaun-akaun beraudit dikemukakan kerana akan wujud kemungkinan jumlah wang tidak tepat akan dibayar. Maka, hakim bicara tidak sepatutnya membenarkan relief-relief yang dipohon.

**(9)** Mahkamah sebulat suara memutuskan, antara lain: (i) Rayuan 220 dibenarkan dengan kos; dan keputusan dan perintah Mahkamah Tinggi berkaitan defendan kedua dan ketiga dan/atau harta pusaka mereka diketepikan; (ii) Rayuan 219 dan Rayuan 221 ditolak dengan kos atas liabiliti dan dibenarkan sebahagian berkaitan dengan relief-relief; perintah Mahkamah Tinggi diketepikan dan digantikan sewajarnya dengan perubahan dan pengecualian.

**(10)** Selepas akaun-akaun beraudit dikemukakan kepada Pemegang Amanah HSBC atau pemegang amanah alternatif yang dilantik mahkamah, dan jika didapati bahawa bayaran-bayaran tertentu perlu dibuat oleh defendan pertama dan/atau defendan keempat, atas tuntutan oleh Pemegang Amanah HSBC atau pemegang amanah alternatif dilantik mahkamah, untuk jumlah itu dibayar, defendan pertama dan/atau defendan keempat, menurut perintah di sini, diperintahkan membayar jumlah sedemikian sewajarnya kepada Amanah. Jika mahkamah, memerintahkan akaun-akaun beraudit dikemukakan kepada Pemegang Amanah HSBC atau pemegang amanah alternatif yang dilantik mahkamah, Dinesh dan defendan keempat mengaku janji untuk membuat kesemua bayaran yang didapati terhutang atau tertunggak kepada Amanah.

**Case(s) referred to:**

*Alan Michael Rozario v. Merbok MDF Sdn Bhd [2011] 1 CLJ 433 CA* ***(refd)***

*Amat Loyut & Ors v. Saling Lau Bee Chiang & Ors (No 3) [2014] 1 LNS 249 HC* ***(refd)***

*Ang Game Hong & Anor v. Tee Kim Tian & Ors [2018] MLJU 449* ***(refd)***

*Asiah Abdul Manap & Anor v. Capital Insurance Bhd [1998] 4 CLJ 257 FC* ***(refd)***

*Badiaddin Mohd Mohidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC* ***(refd)***

*Dato' See Teow Chuan & Ors v. Ooi Woon Chee & Ors And Another Appeal [2013] 4 CLJ 901 FC* ***(refd)***

*Guthrie Property Development Holding Bhd v. Baharuddin Hj Ali & Ors [2010] 6 CLJ 218 HC* ***(refd)***

*Lee Choon Hei v. Public Bank Bhd & Another Appeal [2017] 7 CLJ 438 CA* ***(refd)***

*Leong Sing v. Perusahaan Kuari (Melaka Pindah) Sdn Bhd & Another Case [1997] 1 CLJ 307* ***(refd)***

*Muniandy Thamba Kaundan & Anor v. Development & Commercial Bank Bhd & Anor [1996] 2 CLJ 586 FC* ***(refd)***

*Noor Mohammed v. Hill Produce Trading Co, Badagara & Ors [1980(1)] India Law Report 303* ***(refd)***

*Oriental Bank Bhd v. Nordin Hamid & Ors [2011] 5 CLJ 237 CA* ***(refd)***

*Perusahaan Kuari (Melaka Pindah) Sdn Bhd & Another Case [1997] 1 CLJ 307 HC* ***(refd)***

*Ritz Garden Hotel (Cameron Highlands) Sdn Bhd v. Balakrishan Kaliannan [2013] 7 CLJ 413 FC* ***(refd)***

*Saling Lau Bee Chiang & Ors v. Kanawagi Superumaniam & Ors [2012] 1 LNS 1330 HC* ***(refd)***

*Shirley Kathreyn Yap v. Malcolm Thwaites [2016] 8 CLJ 765 FC* ***(dist)***

*Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 CA* ***(refd)***

*Yong Siew Choon v. Kerajaan Malaysia [2003] 2 CLJ 106 CA* ***(refd)***

*Zulkiflee Adul Samad & Ors v. Segi Objektif (M) Sdn Bhd [2016] 1 LNS 1488 CA* ***(refd)***

**Legislation referred to:**

Anti-Money Laundering, Anti-Terrorism Financing And Proceeds of Unlawful Activities Act 2001, ss. 4(1)(a), 51(1)(a)

Evidence Act 1950, ss. 40, 41, 42, 43

Legal Profession Act 1976, s. 112(1)(b)

Limitation Act 1953, ss. 6(2), 22(1)(a), (2)

Partnership Act 1961, ss. 11, 12, 19(1)

Penal Code, s. 409

Rules of Court 2012, O. 15 rr. 6A(1), (2), (5A), 7(1), (2), 8(1)(a), (b), 9(1), O. 20 r. 5(1), 42 rr. 1(1), 13

Rules of the High Court 1980, O. 15 rr. 6(2)(a), (b), 6A(1), (2), 7(1), (2), O. 20 r. 5, O. 92 r. 4

**Other source(s) referred to:**

SD Singh, JP Gupta & VP Verma, *Law of Partnership in India*, 5th Revised edn, p 389

*(Civil Appeal No: J-02(W)-219-02-2017)*

*For the plaintiffs - Gurdial Singh Nijar, Ragumaren Gopal, Abraham Au Tian Hui, Kenneth Koh, Ragunath Kesavan; M/s G Ragumaren & Co & Rosley Zachariah*

*For the defendants - PM Nagarajan, TA Sivam, Vinoshni Narayanasamy; M/s Nagarajan Peri & Co*

*For the 26th respondent - R Karnan & V Gengeys Vijay*

*(Civil Appeal No: J-02(W)-220-02-2017)*

*For the plaintiffs - Gurdial Singh Nijar, Ragumaren Gopal, Abraham Au Tian Hui, Kenneth Koh, Ragunath Kesavan, M/s G Ragumaren & Co & Rosley Zachariah*

*For the defendants - Ranjan Chandran, Manjeet Singh Dhillon, Shopna Rani Malakar, TA Sivam, Shobah Veera; M/s Hakem Arabi & Assocs*

*For the 26th respondent - R Karnan & V Gengeys Vijay*

*(Civil Appeal No: J-02(W)-221-02-2017)*
*For the plaintiffs - Gurdial Singh Nijar, Ragumaren Gopal, Abraham Au Tian Hui, Kenneth Koh, Ragunath Kesavan, M/s G Ragumaren & Co & Rosley Zachariah*
*For the defendants - Bastion Vendargon, Gene Anand Vendargon, TA Sivam; M/s Bastian Vendargon*
*For the 26th respondent - R Karnan & V Gengeys Vijay*

*[Editor's note: For the High Court judgment, please see Saling Lau Bee Chiang & Yang Lain lwn. Kanawagi Seperumaniam & Yang Lain Dan Satu Lagi Kes [2018] 8 CLJ 587 (overruled in part).]*

*Reported by S Barathi*

## JUDGMENT

**Yeoh Wee Siam JCA:**

**[1]** This judgment is in respect of the following three appeals heard before us on 28 February 2018, 9 – 12 July 2018, 13 August 2018, 15 August 2018 and 16 August 2018 arising from Johor Bahru High Court Civil Suit No. 22-228-2009 ("Suit 228"):

(i) Appeal No. J-02(W)-219-02-2017 filed by Tetuan Khana & Co ("fourth defendant") ("Appeal 219");

(ii) Appeal No. J-02(W)-220-02-2017 filed by Ramlan bin Adong & 12 others ("Appeal 220");

(iii) Appeal No. J-02(W)-221-02-2012 filed by Dinesh Kanavaji a/l Kanawagi ("Dinesh") ("Appeal 221").

**[2]** In this judgment, the parties are referred to as they were in the High Court. However, wherever the context requires, any of the defendants and/or Dinesh would be referred to as "the appellant" or "the appellants".

### Background Facts

*The Land Acquisition*

**[3]** Sometime in the early 1990s, the Johor State Government acquired 53,000 hectares of land in the Linggui Valley, Kota Tinggi District, Johor for the purposes of construction of a dam pursuant to an agreement with the Government of Singapore ("the land"). The acquisition of the land affected mainly three Orang Asli villages, namely;

(i) Kampung Sayong Pinang;

(ii) Kampung Semanggar; and

(iii) Kampung Pasir Intan.

**[4]** As a consequence of the acquisition, the Orang Asli from the three villages were deprived of the use of their ancestral land and traditional sources of income. In or about 1994, the Orang Asli living in the said villages

A decided to sue the Johore State Government for compensation. For that purpose, 52 of the Orang Asli from the three villages appointed the first defendant in Suit 228, Kanawagi a/l Seperumaniam ("Kanawagi"), of Tetuan Khana & Co ie, the fourth defendant in Suit 228 ("Khana & Co" or "the firm"), to represent them.

B **[5]** A person by the name of Hamzah Mohd Tahir ("Hamzah") led the negotiations on behalf of the Orang Asli with the Johor State Government. However, the negotiations failed. Hamzah then introduced the following three village headmen to the first defendant:

C (i) Adong bin Kuwau, who was the Tok Batin of Kampung Sayong Pinang, the second defendant in Suit 228 ("Tok Batin Adong");

(ii) Daud bin Kadir, who was the Tok Batin for Kampung Semanggar, the third defendant in Suit 228 ("Tok Batin Daud"); and

D (iii) Abdul Rahman bin Abdullah of Kampung Pasir Intan ("Abdul Rahman"). However, he was not a Tok Batin.

(Tok Batin Adong and Tok Batin Daud are hereinafter also referred to as "the two Tok Batins").

**[6]** The first defendant, through his law firm, Khana & Co, acted for the E 52 Orang Asli in their claim for compensation against the Johor State Government in Johor Bahru High Court Originating Summons Suit No. 24.828.1994 ("OS 828").

**[7]** In OS 828, the plaintiffs, ie, the 52 Orang Asli, sought the following declarations:

F (i) a declaration that all the lands acquired by the defendants for the purpose of constructing the Sungai Linggiu Dam near Kota Tinggi, Johor is aboriginal area or aboriginal reserve;

(ii) a declaration that the defendants jointly or severally pay to the plaintiffs G all the compensation received by them from the Government of the Republic of Singapore or a sum deemed just by the court.

**[8]** The 52 Orang Asli obtained judgment in OS 828 on 19 December 1995 for the sum of RM26,500,000 as compensation to be paid to the Orang Asli ("the compensation order").

H **[9]** The appeal of the Johor State Government against the High Court decision in OS 828 was dismissed with costs by the Court of Appeal on 19 November 1997. The matter was remitted to the Johor Bahru High Court to decide in OS 828 on the terms and mechanics of the payment of compensation to the 52 Orang Asli. Khana & Co filed an application for an I order for the management of the compensation sum awarded to the Orang Asli.

**[10]** Consequently, in respect of OS 828, the Johor Bahru High Court made an order on 5 June 2000 as follows: A

(i) the Johor State Government to pay the compensation together with interest accrued amounting to RM38,554,111.92 ('the judgment sum');

(ii) the sum of RM22 million from the judgment sum to be paid into a trust account and a trust be established under the name of the Linggiu Valley Orang Asli (Jakuns) Trust ("the Trust"). B

(iii) the Trust must be established in accordance with the deed of trust ("trust deed") as ordered by the court;

(iv) Tok Batin Adong, Abdul Rahman and Kanawagi be appointed as the first trustees ("first trustees"), and who shall execute the trust deed; C

(v) the Director General ("DG") of Jabatan Hal Ehwal Orang Asli, Malaysia (JHEOA), for the time being shall be appointed the additional trustee of the Trust; D

(vi) the balance of the compensation sum (amounting to RM16,554,111.92) was to be handed to Kanawagi who shall distribute the said sum to the 52 Orang Asli after the deduction and payment of legal fees, costs, consultation fees and expenses incurred; and

(vii) the trustees have liberty to apply in relation to be implementation of the Trust and the performance of their duties under the Trust. E

("the trust order")

**[11]** By the trust order, a trust deed dated 5 June 2000 was created governing the terms relating to the RM22 million. On 5 July 2000, the Johor State Government paid the RM22 million directly to the trustees. On 13 July 2000 the Johor State Government paid the balance sum of RM16,554,111.92 directly to Khana & Co. F

*The Trust Deed*

G

**[12]** The salient terms of the Trust as embodied in the trust deed are:

(i) The RM22 million would be kept in Trust for the 52 Orang Asli and their descendants, but no child descendant shall be entitled to any share or distribution of the assets or income during the lifetime of his or her parent (cl. 2 of the trust deed); H

(ii) The trustees shall be:

(a) Tok Batin Adong, and Abdul Rahman, ie, the headmen of the villages;

(b) the DG of JHEOA; I

(c) one independent person;

(d) the first trustees (cl. 3.1 of the trust deed);

(e) RM900 per month to be paid to the beneficiaries of the Trust from the RM22 million;

(f) the trustees to maintain proper accounts (cl. 8 of the Trust deed).

*The Disbursement Of The Compensation Sum*

**[13]** On or about 5 July 2000, the Johor State Government paid the compensation sum of RM22,000,000 directly to Khana & Co. On 13 July 2000, the Johor State Government paid a further sum of RM16,554,111.92 to Khana & Co in accordance with the terms of the Trust order. According to the defendants, pursuant to the High Court order dated 5 June 2000, the following payments, *inter alia*, were made:

(i) RM2,200,000 was paid to Hamzah;

(ii) RM1,900,000 and RM3,000,000 were paid to Messrs R Rajasingam & Co;

(iii) RM500,000 was paid to Messrs RR Sethu;

(iv) The sum of RM500,000 and RM4,054,222.93 were paid to Khana & Co as lump sum legal fees.

**[14]** The trustees then placed the compensation sum of RM22,000,000 in a fixed deposit, and through the two Tok Batins and Abdul Rahman paid the RM900 per month including any monthly interest balance to the beneficiaries (ie, to each of the 52 plaintiffs) as stipulated under cl. 5 of the trust deed from October 2000 until March 2009.

**[15]** By a court order dated 4 April 2006 (Johor Bahru High Court Civil Suit No. 24-197-2006), Kanawagi and Khana & Co were ordered to provide a financial statement of the Trust certified by a qualified public accountant. However, through their solicitors, Messrs Sharifah & Associates, the defendants instead submitted unaudited/uncertified financial statements for the years 2000 to 2006 which in essence was in violation of the said court order. Thus, the plaintiffs contended that by doing so the defendants are in breach of cl. 8.1 of the trust deed which stipulates:

> In each financial year the trustees shall have prepared by a certified public accountant authorised to practise in Malaysia financial statements, including a profit and loss account and balance sheet as at and of each financial year certified by such accountant to be true and proper statement of the affairs of the Trust setting out all:
>
> (a) income of the Trust fund;
>
> (b) capital of the Trust fund;
>
> (c) costs and disbursements and other outgoings paid or payable out of the Trust fund and chargeable against income;
>
> (d) capital expenditure and liabilities chargeable to capital;

(e) investment and money comprised in the Trust fund;

(f) amounts distributed by the trustees to each beneficiary;

(g) to the extent to which the trustees may require, the separate recording of any category of income capital.

**[16]** The plaintiffs, who are beneficiaries to the Trust, sued the defendants in Suit 228 for the following:

(i) as against the defendants, for breach of Trust;

(ii) as against Kanawagi, and Khana & Co, for breach of constructive Trust relating to the balance sum of RM16,554,111.92;

(iii) as against the two Tok Batins, for knowing receipt of Trust funds.

We note that Abdul Rahman was not made a defendant in Suit 228.

**[17]** On 1 August 2008 the trustees withdrew RM7 million out of the RM22 million and purchased 27 units of condominium as investment. On 5 September 2004 a police report was made by the first plaintiff, Saling bin Lau Bee Chiang, against the trustees for impropriety in the management of the trust. Kanawagi and his son, Dinesh, were charged for criminal breach of Trust under the Penal Code, and for money laundering under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ("AMLA"). Kanawagi and Dinesh were acquitted and discharged without their defence being called. On appeal, the High Court upheld and affirmed the decision of the Sessions Court.

*The Appointment Of The Receiver And Manager*

**[18]** On 25 March 2009, the High Court of Johor Bahru appointed an interim receiver and manager ("the R&M") to manage the Trust. After the appointment of the R&M, the R&M filed a suit in the Kuala Lumpur High Court relating to the same subject matter, namely MTKL-22NCC-1512-09-2011 ("KL suit"). The first to seventh defendants filed an application to transfer the KL suit to the Johor Bahru High Court, and for it to be consolidated with the first suit, ie, Suit 228. The Kuala Lumpur High Court dismissed the application. On appeal, the Court of Appeal allowed the appeal and ordered the KL suit to be transferred to the Johor Bahru High Court and for it to be consolidated with Suit 228. The KL suit was registered as Johor Bahru High Court Civil Suit No. 23NCVC-106-07-2012 ("Suit 106").

*Injunctions And AMLA Seizure*

**[19]** Sometime in 2009, 78 beneficiaries *vide* Suit 228 applied *ex parte* for an injunction which was granted by High Court on 17 April 2009. The defendants were restrained from disposing, dissipating and/or diminishing the assets of the Trust. On a second application, the High Court on 5 May 2009 granted an *ad interim* order appointing an R & M to receive and manage all the assets of the Trust. The defendants were ordered to deliver all the assets of the Trust to the R & M, in particular, the 27 condominium units.

**[20]** The defendants applied to set aside the injunctions. However, the applications were dismissed by the High Court on 11 September 2009. The defendants' appeal to the Court of Appeal was dismissed, which means both the injunctions still remain in force.

**[21]** On 6 August 2012 the Public Prosecutor seized the 27 condominium units pursuant to s. 51(1)(a) of the AMLA as they were purported to be the subject matter of an offence under s. 4(1) of the AMLA. The notice of seizure dated 6 August 2012 notified in clear terms that Kanawagi was prohibited from dealing with the property in any manner whatsoever.

**The Plaintiffs' Claim In Suit 228**

**[22]** In Suit 228, the plaintiffs claimed that Kanawagi and Tok Batin Adong, as trustees of the Trust, owed fiduciary duties to the plaintiffs as beneficiaries of the Trust, whilst Khana & Co, were constructive trustees of the amounts received and held by them in respect of the Trust. It is the plaintiffs' pleaded case that the defendants committed various breaches of the Trust and/or assisted in those breaches of the Trust to the detriment of the plaintiffs.

**[23]** In the same suit, the plaintiffs contended that the defendants failed, refused and/or neglected to provide and render any information and accounting whatsoever in respect of the Trust and the Trust funds.

**[24]** The plaintiffs appointed Folks Corporate Services Sdn Bhd ("Folks") to audit the unaudited financial statement. Folks prepared a report dated 17 January 2008 and made certain findings which formed the basis for the plaintiffs' claim in Suit 228:

(i) the trust deed has been breached for failing to include the DG of JHEOA as a trustee;

(ii) there are less than four trustees which is not in accordance with the terms of the trust deed;

(iii) between the years 2000-2006, the sum of RM5,511,457 was paid to the beneficiaries. However, a sum of less than RM2,778,300 was instead received by the beneficiaries and there was no accounting for this discrepancy;

(iv) no details of legal fees, costs, consultant fees and expenses with regard to the payment of RM16,554,111.92 as legal fees;

(v) the sum of RM2,716,920 was not accounted for. This is a sum purportedly paid to the three village headman, ie, the two Tok Batins and Abdul Rahman, for the purpose of distribution to the beneficiaries, but the plaintiffs, as beneficiaries, were not aware of it, nor had they received this sum;

(vi) no tax has been paid on the revenue.

*The Plaintiffs' Prayers For Reliefs*

**[25]** In para. 83.3F of the plaintiffs' amended statement of claim dated 8 February 2012 (which was applicable at the time of commencement of the trial) for Suit 228, the plaintiffs prayed for the following reliefs:

83.3F Removal and appointment of trustees

(a) For an order that the first and second Defendants [or any other trustees that may have been appointed since] be removed as the trustees to the Linggiu Valley Orang Asli (Jakun) Trust forthwith and that HSBC (Malaysia) Trustee Berhad ('HSBC trustees') be appointed as sole trustees in place of the first and second Defendants (or any other trustees that may have been appointed since) for the Linggiu Valley Orang Asli (Jakun) Trust forthwith;

(b) That the terms of the Trust deed be varied pursuant to Clause 10 to replace the trustees for the Linggiu Valley Orang Asli (Jakun) Trust as prayed for in (a);

(c) That the Linggiu Valley Orang Asli (Jakun) Trust funds be transferred to and/or administered by HSBC trustees in place of the first and second Defendants (or any other trustees that may have been appointed since);

(d) That all necessary vesting and other orders in favour of HSBC trustees in respect of the Linggiu Valley Orang Asli (Jakun) Trust may be made;

(e) In so far is necessary, the administration of the Linggiu Valley Orang Asli (Jakun) Trust be undertaken by this Honourable Court;

(f) That HSBC trustees be at liberty to apply to the Court in respect of any matters concerning the administration of the Trust.

Injunctive relief

(g) That the first and second Defendants and/or any persons appointed by the first and second Defendants and/or any servants/agents of the first and second Defendants be restrained from holding themselves out as trustees for the Linggiu Valley Orang Asli (Jakun) Trust;

(h) An order that the first and second Defendants hand over the operation of all monies and assets in the Linggiu Valley Orang Asli (Jakun) Trust together with all relevant and required documents, bank statements etc to HSBC trustees forthwith and sign all documents as may be necessary to allow HSBC trustees to manage the Linggiu Valley Orang Asli (Jakun) Trust;

(i) In the event the first and second Defendants do not perform as ordered in prayer (h) above, that the Registrar of the Court do execute all relevant documents necessary to effect and complete the transfer of trusteeship of the Linggiu Valley Orang Asli (Jakun) Trust to HSBC trustees;

(j) An order that the first and second Defendants be compelled within forty-eight (48) hours from date of the order to inform the Plaintiffs' Solicitors and/or this Court by way of an affidavit to be filed in Court and served on the Plaintiffs' solicitors, as to the exact details of where the Trust funds were kept/maintained from its receipt to current date whether within or outside the jurisdiction of Malaysia ie name of the body or financial institution, the dates of placement/deposit and withdrawal of the Trust funds from such body or institution, its address, account number, amounts placed therein and any other information as may be required from time to time by the Plaintiffs and/or HSBC trustees.

(k) An order that the first and second Defendants, jointly or in their several capacity, be restrained forthwith from dealing in any manner whatsoever with the Trust monies in whichever account or place or any bank or financial institution that have been maintained by the first and second Defendants, jointly or in their several capacity, within or outside the jurisdiction of Malaysia.

Appointment of new trustees on terms

(l) An order that HSBC trustees be appointed on the following terms and conditions:

(i) that HSBC trustees shall ensure that the Trust assets are in the name of the Trust;

(ii) that HSBC trustees shall provide to the Plaintiffs and to this Court a monthly portfolio valuation report which will provide detail as to the asset Trust funds allocation and the transactions carried out during the period;

(iii) that HSBC trustees shall be entitled to invest the Trust assets to ensure capital appreciation;

(iv) that HSBC trustees shall be entitled to perform the necessary corporate action(s) for the investment of the Trust funds equities;

(v) that HSBC trustees shall distribute a monthly income of not less than RM900.00 to the Plaintiffs' respective accounts as stipulated in the Trust deed;

(vi) that HSBC trustees shall prepare annual audited accounts with respect to the Trust funds;

(vii) that HSBC trustees shall prepare annual tax returns for submission to Inland Revenue;

(viii) that HSBC trustees agrees to fix their fee at 0.5% of the gross asset value of the fund subject to a minimum fee of RM30,000.00 per annum and a maximum fee of RM100,000.00 per annum;

(ix) that HSBC trustees shall do all things to comply fully with the terms of the Trust deed and for the full benefit of the Plaintiffs and the other beneficiaries of the Linggiu Valley Orang Asli (Jakun) Trust.

As regards the RM16,554,111.92 forming part of the Actual Compensation

(m) An audited statement of accounts with respect to the RM16,554,111.92, be ordered to be given by the first and 4th Defendants to the new trustees i.e. HSBC trustees together with copies of all certified and relevant and supporting documents evidencing the same, within fourteen (14) days from date of the order.

(n) That the new trustees i.e. HSBC trustees' appointed auditor will be entitled to conduct an independent audit on receipt by the new trustees i.e. HSBC trustees of the said accounts and documents rendered by the first and 4th Defendants and thereafter render such audit report to the Plaintiffs and/or their solicitors and to the Court as soon as may be possible;

(o) that the first and 4th Defendants do be ordered to pay the sum found to be due on the taking of the said accounts forthwith and that such payment be made to the new trustees i.e HSBC trustees and to be placed in the Linggiu Valley Orang Asli (Jakun) Trust managed by them for the full benefit of the Plaintiffs;

(p) An Order that the payment of such sums due as stated in prayer (o) be paid by the first and second Defendants to the new trustees together with interest accrued thereon at the rate of 8% per annum from the date the sums were due to date of realisation.

As regards the RM22,000.000.00 forming part of the Actual Compensation

(q) An audited statement of accounts (such statement certified by the person primarily responsible for the financial management of the first and second Defendants) with respect to the RM22,000.000.00, be ordered to be given by the first and second Defendants to be new trustees i.e HSBC trustees together with copies of all certified and relevant and supporting documents evidencing the same within thirty (30) days from date of the order.

(r) That the new trustees i.e. HSBC trustees appointed auditor ie Folks Corporate Services Sdn Bhd do be entitled to conduct an independent audit on receipt by the new trustees i.e. HSBC trustees of the said accounts and documents rendered by the first and second Defendants under (q) above, to verify the same and be allowed access to all the relevant and supporting documents in the Defendant's office [or at any place where such documents are maintained], and thereafter render such audit report to the Plaintiff, the Defendants and to the Court as soon as may be possible;

(s) That the first and second Defendants do be ordered to pay the sum found to be due on the taking of the said accounts forthwith and that such payment be made to the new trustees i.e HSBC trustees and to be placed in the Linggiu Valley Orang Asli (Jakun) Trust managed by them for the full benefit of the Plaintiffs;

(t) An Order that the payment of such sums due as stated in prayer (s) be paid together with interest accrued thereon at the rate of 8% per annum from the date such sums became due to date of realisation.

As regards the sums received by the third Defendant

(u) That the third Defendant to provide an account of all monies paid out to him by the first and/or 4th Defendants by way of an affidavit affirmed and served on the Plaintiffs' solicitors within 2 days of this order.

Special Damages

(v) That judgment be given for RM1,000.000.00 and the Defendants be ordered to pay the sum of RM1,000,000.00 to HSBC trustees and to be placed in the Linggiu Valley Orang Asli (Jakun) Trust managed by them for the full benefit of the Plaintiffs;

(w) That judgment be given for RM2,200,000.00 and that the Defendants be ordered to pay the sum of RM2,200,000.00 to HSBC trustees and to be placed in the Linggiu Valley Orang Asli (Jakun) Trust managed by them for the full benefit of the Plaintiffs.

Damages

(x) Damages to be ordered to be paid by the first to 4th Defendants to the Plaintiffs;

Costs

(y) That the Defendants be ordered to pay costs to the Plaintiffs on an indemnity basis.

Further or other relief ...

(z) Such further and/or other relief deemed fit and appropriate by this Honourable court to so grant.

**Decision Of The High Court**

**[26]** On 22 December 2016, the High Court delivered its decision in respect of Suit 228. The plaintiffs' claim for reliefs and remedies from the defendants, including Dinesh, jointly or severally was allowed as follows:

(i) Declaration

(a) It is declared that the defendants, including Dinesh Kanavaji, have failed to give a proper account of the affairs of the Trust to the plaintiffs.

(b) It is declared that the third defendant was never a trustee.

(c) It is declared that the first, second and fourth defendants, including Dinesh Kanavaji, have failed to discharge their duties as trustees/constructive trustees properly.

(d) It is declared that the defendants, including Dinesh Kanavaji, have misused, mismanaged and misappropriated Trust funds for their own personal gain.

(e) It is declared that the first and second defendants are liable to the plaintiffs for breach of trust.

(f) It is declared that the fourth defendant, including Dinesh Kanavaji, have breached their duty as constructive trustees towards the plaintiffs.

(g) That the first and second defendants are hereby removed as trustees of the Trust.

(h) It is declared that the defendants, including Dinesh Kanavaji, have breached their duties as trustees/constructive trustees when they withdrew RM7,000,000 from the Trust fund.

(i) An order that the R & M continues to discharge his obligations according to any order which might be made in this suit and/or in the Civil Suit No: 23NcVC-106-07/2012 by this court, until the application of the R & M and/or the plaintiffs that the R & M be discharged and released.

(j) Clause 3 of the Trust deed is varied to state that the sole trustee of the Trust shall be HSBC (Malaysia) Trustee Berhad, but only from such time as directed by this court upon the application of the R & M and/or the plaintiffs.

(k) That cl. 9 of the Trust deed is varied to state that the remuneration of the trustee shall be at the rate in accordance with the standard rate as stated in the terms of appointment of HSBC (Malaysia) Trustee Berhad.

(ii) Damages:

(a) The defendants including Dinesh Kanavaji pay the sum of RM16,054,111.92 to the beneficiaries of the Trust;

(b) The defendants including Dinesh Kanavaji pay the sum of RM2,716,920 to the Trust;

(c) The defendants including Dinesh Kanavaji pay the sum of RM1,057,340.33 to of the Trust;

(d) The defendants including Dinesh Kanavaji pay the sum of RM865,072.04 to the Trust;

(e) The defendants including Dinesh Kanavaji pay the sum of RM27,863.31 to the Trust;

(f) The defendants including Dinesh Kanavaji pay the sum of RM40,000 to the Trust;

(g) The defendants including Dinesh Kanavaji pay the sum of RM5,000,000 to the plaintiffs based on their conduct in abusing and mismanaging the Trust funds involving millions of Ringgit.

(iii) Cost:

Cost of RM500,000 payable by the defendants including Dinesh Kanavaji to the plaintiffs.

**Consideration Of The Three Appeals By This Court**

**Appeal 220**

*The Demise Of The Two Tok Batins Before The Trial*

**[27]** This is the appeal by the alleged 13 representatives ("the 13 appellants") of the estate of the two Tok Batins, namely the second and third defendants, against the whole of the decision of the High Court dated 22 December 2016.

**[28]** Suit 228 was filed in 2009. The full trial of Suit 228 commenced on 1 October 2012 and ended on 23 May 2016. Tok Batin Adong, the second defendant, passed away on 11 July 2010, ie, more than two years before the trial commenced. Tok Batin Daud, the third defendant, passed away on 14 November 2010, almost two years before the trial commenced.

**[29]** Learned counsel for the plaintiffs submitted that the 13 appellants were not parties in the court below. Therefore, they have no *locus standi* to appear before this court. On this point alone, Appeal 220 ought to be struck out.

**[30]** It is an undisputed fact that the plaintiffs had, by way of a summons in chambers (encl. 468), applied to substitute the second and third defendants with their estates. The application, as stated in the first paragraph of encl. 468, was made pursuant to O. 20 r. 5, O. 15 r. 6(2)(a) and (b), O. 15 r. 6A(1) and (2), O. 15, and O. 92 r. 4 of the applicable rules then, ie, the Rules of the High Court 1980 ("RHC").

**[31]** Gunalan Muniandy JC (as he then was) heard encl. 468 and gave his decision dated 28 December 2012 (see *Saling Lau Bee Chiang & Ors v. Kanawagi Superumaniam & Ors* [2012] 1 LNS 1330). He dismissed the application for substitution. We note from his decision that there was no legal representation of the two deceased Tok Batins, ie, the second and third defendants, during the hearing of encl. 468.

**[32]** On appeal, the Court of Appeal on 3 April 2013 allowed the appeal of the plaintiffs therein and granted the order for substitution of the two deceased Tok Batins ("substitution order"). Again, there was no legal representation of the two deceased Tok Batins in the Court of Appeal.

**[33]** The 13 appellants submitted that they are the lineal descendants of the two deceased Tok Batins. They contended that they were not at the trial of Suit 228, and yet the High Court allowed the plaintiffs' claim against the two Tok Batins and made various orders, *inter alia*, against the estate of the two deceased Tok Batins. Being aggrieved by such orders, the 13 appellants therefore filed this appeal.

**[34]** The plaintiffs were unable to produce any proof of service on the representatives of the estate of the two deceased Tok Batins, or on the 13 appellants of the substitution order granted by the Court of Appeal.

**[35]** Learned counsel for the plaintiffs submitted that further to the substitution order, the plaintiffs were not required to take any further action. In the alternative, the omission by the plaintiffs in filing the amended writ and statement of claim naming the 13 appellants herein was merely a procedural irregularity, and the High Court trial had proceeded properly and regularly, as if the amended writ and statement of claim were in fact filed.

**[36]** The plaintiffs further submitted that the learned High Court Judge ("judge") took cognisance of the substitution order of the Court of Appeal dated 3 April 2013 and at p. 14 of his judgment had stated that all references to the liability of the second and third defendants are to be imputed onto their estates.

**[37]** The RHC have been revoked and replaced by the Rules of Court 2012 ("ROC") which come into operation on 1 August 2012. Order 15 and O. 20 of the ROC are similar to the ones in the RHC. Both parties submitted before us on the applicability of, *inter alia*, O. 15 r. 6A(1), (2) and (5A), O. 15 r. 7(1) and (2), O. 15 r. 8(1)(a) and (b), O. 15 r. 9(1) and O. 20 r. 5 of the ROC. We now set out the relevant provisions of O. 15 and O. 20 of the ROC:

O. 15:

6A Proceedings against estates (O. 15 r. 6A)

(1) Where any person against whom an action would have lain has died but the cause of action survives, the action may, if no grant of probate or administration has been made, be brought against the estate of the deceased.

(2) Without prejudice to the generality of paragraph (1), an action brought against "the personal representatives of A. B. deceased" shall be treated, for the purposes of that paragraph, as having been brought against his estate.

…

(5A) Where an order is made under paragraph (4) appointing the Official Administrator to represent the estate of the deceased, the appointment shall be limited to his accepting service of the writ or originating summons by which the action was begun unless, either on making such an order or on a subsequent application, the Court, with the consent of the Official Administrator, directs that the appointment shall extend to taking further steps in the proceedings.;

7 Change of parties by reason of death (O. 15 r. 7)

(1) Where a party to an action dies or becomes bankrupt but the case of action survives, the action shall not abate by reason of the death or bankruptcy.

A (2) Where at any stage of the proceedings in any cause or matter the interest or liability of any party is assigned or transmitted to or devolves upon some other person, the Court may, if it thinks it is necessary in order to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, order that other person to be made a party to the B cause or matter and the proceedings to be carried on as if he had been substituted for the first-mentioned party. An application for an order under this paragraph may be made *ex parte*.;

8 Provisions consequential on making order under rule 6 or 7 (O. 15 r. 8)

C (1) Where an order is made under rule 6, the writ by which the action in question was begun shall be amended accordingly and shall be endorsed with ...

(a) a reference to the order in pursuance of which the amendment is made; and

D (b) the date on which the amendment is made,

and the amendment shall be made within such period as may be specified in the order or, if no period is so specified, within fourteen days after the making of the order.

(2) Where by an order under rule 6 a person is to be made a defendant, E the rules as to the service of a writ of summons shall apply accordingly to the service of the amended writ on him.;

9 Failure to proceed after death of party (O. 15 r. 9)

(1) If after the death of a plaintiff or defendant in any action the cause of action survives, but no order under rule 7 is made substituting F as plaintiff any person in whom the cause of action vests or, as the case may be, the personal representatives of the deceased defendant, the defendant or, as the case may be, those representatives may apply to the Court for an order that, unless the action is proceeded with within such time as may be specified in the order, the action shall be struck out as against the plaintiff or G defendant, as the case may be, who has died; but where it is the plaintiff who has died, the Court shall not make an order under this rule unless the Court is satisfied that due notice of the application has been given to the personal representatives, if any, of the deceased plaintiff and to any other interested persons who, in the opinion of the Court, shall be notified.; H

O. 20:

Amendment of writ or pleading with leave (O. 20 r. 5)

5. (1) Subject to Order 15, rules 6, 6A, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the I plaintiff to amend his writ, or any party to amend his pleading, on such terms as to cost or otherwise as may be just and in such a manner, if any, as it may direct.

**[38]** From a perusal of the first paragraph of encl. 468 itself, and the applicable provisions of the RHC, we are of the view that encl. 468 was made under O. 15 r. 6A of the RHC, and not under O. 15 r. 7(1) and (2) of the RHC (as contended by the 13 appellants). Thus, the cause of action against the two Tok Batins survived after the death of the two Tok Batins, and the action or Suit 228 may be brought against their estate.

**[39]** However, we do not agree with learned counsel for the plaintiffs that, after having obtained the substitution order, there are no more steps to be taken. In *Asiah Abdul Manap & Anor v. Capital Insurance Bhd* [1998] 4 CLJ 257; [1998] 4 MLJ 361, the Federal Court at p. 268 (CLJ); p. 372 (MLJ) stated that after the death of a party, there is a necessity to substitute the parties so as to be able to carry on with the suit:

> We note that this court granted leave to appeal on the specific question as to whether the order of the Court of Appeal dated 25 July 1995 should be set aside since it was made after the deceased Kasim had died and no order of substitution or to carry on the proceedings under r 41 of the Rules of the Court of Appeal 1994 had been given. The said rule 41 provides for reconstitution of an appeal in the event of certain changes affecting a party eg death or affecting the interest or liability of a party. Where an appellant (or a respondent) dies, the appeal does not, by that reason alone, become abate (r 40). The proper thing to do at that stage would be for the personal representative, if any, or any person interested to apply under r 41 for a substitution order or an order to carry on the proceedings.

In *Yong Siew Choon v. Kerajaan Malaysia* [2003] 2 CLJ 106 at pp. 113 and 114, the Court of Appeal stated:

> In the present case, the action was commenced in accordance with the permissive provision in O. 15 r. 6A(1). But it was prosecuted in defiance of the mandatory provisions of O. 15 r. 6A(4) which is the only provision that enables an action to be kept on foot. So, non-compliance of O. 15 r. 6A(4) is not a mere irregularity, it runs counter to a point of substantive law, namely, that an action cannot be maintained against the estate of a deceased person in the absence of the extraction of letters of representation. It follows that the respondent's suit in the present instance is an illegality and therefore a nullity.
>
> To summarise, the rule of substantive law is that an action may be commenced and maintained by or against the estate of a deceased after, and only after, letters of representation have been extracted. Order 15 r. 6A provides a very limited exception to that substantive rule by permitting the commencement of an action against the estate of a deceased even before the extraction of letters of representation. But it regulates the future prosecution of the action by requiring (in r. 6A(4)) certain steps to be taken in that respect and specifying the time limited for the taking of such steps. Failure to observe the terms of r. 6A(4) of O. 15 will therefore deprive a plaintiff of the beneficial effect of r. 6A and thereby activate the principal rule of substantive law governing such actions so as to render the action already commenced a nullity.

**[40]** Applying the principles in the above authorities to the present case, after being granted the substitution order by the Court of Appeal, the plaintiffs are required to serve such order on the estate of the two deceased Tok Batins, which they failed to do.

**[41]** In addition, the plaintiffs are also required to amend the writ of summons ("writ") and the statement of claim, in particular the intitulement, file it in court, and at the same time serve it on the estate of the two deceased Tok Batins. Again, this was not done.

**[42]** We do not agree with the submissions of learned counsel for the plaintiffs that, pursuant to O. 20 r. 5(1) of the ROC, there is no requirement for service of the amended writ and statement of claim dated 3 April 2013 on the estate of the two deceased Tok Batins since the amendments made were in the course of proceedings. This is for the reason that the estate of the two deceased Tok Batins was originally not a party to Suit 228. They were not existing parties, but are now to be made new parties to the suit. Therefore, they have to be served with such amended pleadings before they can defend the claim.

**[43]** In this respect, we cite O. 42 r. 1(1) and O. 42 r. 13 of the ROC which require every judgment and order of the court to be given or served on parties, as the case may be:

> Delivering judgment (O. 42 r. 1)
>
> 1. (1) Every judgment, after the hearing of a cause or matter in open Court, shall, subject to paragraphs (3) and (4), be pronounced in open Court either on the conclusion of the hearing or on a subsequent day of which notice shall be given to the parties.
>
> ...
>
> Setting aside or varying judgment and orders (O. 42 r. 13)
>
> 13. Save as otherwise provided in these Rules, where provisions are made in these Rules for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment shall make an application to the Court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order of judgment by him.

**[44]** We further note that there is no proof of service of the judgment of the High Court in Suit 228 on the estate of the two Tok Batins, or even on the 13 appellants.

*Non-representation Of The Estate Of The Second And Third Defendants, ie, The Two Tok Batins, During The Trial*

**[45]** In the order dated 22 December 2016 issued pursuant to the judgment of Samsudin bin Hassan J given after the trial of Suit 228, it is stated that the first, second and third defendants were represented by Shopna Rani Malabar ("Shopna Rani"). However, Shopna Rani submitted there is an error

in the order. She only represented the first defendant, but not the second and third defendants. This was evidenced by the notice of change of solicitors dated 4 January 2013 and the notes of proceedings in the High Court dated 22 December 2016.

**[46]** From the documents produced by learned counsel for the plaintiff (see "chronology of representation in the JBHC Suit: MTI-220-228-2009 Suit" ("chronology")], and by Shopna Rani, this court notes the following:

(i) the letter dated 4 May 2009 from Messrs Khana & Co to Messrs G Ragumaren & Co states that Messrs Khana & Co act for the defendants. This means that they were also acting for the second and third defendants (tab 1 of chronology);

(ii) from the notice of change of solicitors dated 25 May 2009, Messrs Sharifah & Associates took over from Messrs Khana & Co (tab 2 of chronology). This means that they ceased to act for the second and third defendants from 17 October 2011;

(iii) Tok Batin Adong (second defendant) passed away on 11 July 2010, and Tok Batin Daud (third defendant) passed away on 14 November 2010. In the Johor Bahru High Court Order dated 17 October 2011, Messrs Sharifah & Associates were disqualified from representing the defendants (tab 3 of chronology);

(iv) pursuant to the notice of change of solicitors dated 31 October 2011 (tab 4 of chronology), Messrs Mohamed Isa & Associates acted as solicitors for the first defendant. However, there was no mention that they acted for the second and third defendants;

(v) after 17 October 2011, there appears to be no solicitors on record for the second and third defendants;

(vi) Messrs G Ragumaren & Co, by a letter dated 24 October 2017 to Messrs Shopna Rani Malakar & Co, enclosed the judgment dated 22 December 2016 "by way of service on you as solicitors for the first, second and third defendants" (tab 19 of chronology).

**[47]** We do not think that the letter in para. 46(vi) above proves that Messrs Shopna Rani Malakar & Co are the solicitors for the second and third defendants. There was no notice of change of solicitors filed to that effect. Based on the documents tendered, we accept Shopna Rani's submission that there is an error in the order dated 22 December 2016. Therefore, as noted in the notes of proceedings dated 22 December 2016, the second and third defendants, and also their estate, were absent in court, and were not represented by counsel at the trial.

**[48]** Learned counsel for the plaintiffs submitted that at all material times, the 13 appellants were fully aware of the proceedings. He brought to the attention of this court the Johor Bahru High Court Civil Suit No. 23NCVC-

143-10/2012, *Amat Loyut & Ors v. Saling Lau Bee Chiang & Ors (No 3)* [2014] 1 LNS 249 ("suit 143") where the 13 appellants were also plaintiffs out of the 163 plaintiffs in suit 143. In that suit, the 13 appellants sued the plaintiffs in the present case as defendants, including the first defendant herein for acting, *via* his legal firm ie, the fourth defendant herein, for gross abuse of the court process.

**[49]** The following statements of Abdul Rahman Sebli J (as he then was) in his judgment in suit 143, regarding the application by Messrs Sharizal & Nasir to discharge themselves from acting as solicitors for the 163 plaintiffs, are noted:

> At page 7:
>
> Essentially the plaintiffs' claim in the present suit is to remove the first defendant as Receiver & Manager of the Linggiu Valley Orang Asli (Jakun) Trust who had earlier been appointed by the court in Suit No. 22-228-2009 ('the 228 Suit) by an *ex parte* order dated 17.4.2009 and confirmed by an *inter parte* order dated 11 September 2009. The 228 suit is still 'alive' and ongoing before another Johor Bahru High Court. The core subject matters in the present suit are the same as those in the 228 suit and the reliefs sought by the plaintiffs had already been sought (and refused) in the 228 suit. Clearly therefore the filing of the present suit was an abuse of process. If the plaintiffs wanted to seek a revocation of the appointment of the first defendant as Receiver & Manager, they should have applied to do so under the 228 suit and not by filing a separate and overlapping suit seeking the same relief.";
>
> At pages 13 and 14:
>
> I should perhaps first deal with the motive for Mr Subramaniam's seemingly keen and unwavering interest in fighting for the Orang Asli cause. The first and 8th defendants' contention (and this is supported by the Bar Council) is that Mr Subramaniam had and ulterior motive and had colluded with one Kanawagi a/l Seperumaniam ('Mr Kanawagi') in instituting the present suit for the sole benefit and interest of Mr Kanawagi and one Dinesh Kanavaji ('Mr Dinesh'). Both are being sued for misusing millions of Trust funds and misuse of the 27 units of condominium bought with Trust funds in the ongoing 228 and 106 suits. There is evidence that Mr Kanawagi, Mr Dinesh and Mr Subramaniam are friends. It is also the first and 8th defendants' case that the filing of the present suit was a desperate attempt to strike out criminal breach of Trust charges and charges under the Anti-Money Laundering Act against Mr Kanawagi and Mr Dinesh. In short it was an elaborate scheme by the protagonists to save Mr Kanawagi and Mr Dinesh from their liabilities and wrongdoings in connection with the Trust monies and that the filing of the suit had nothing to do with seeking justice for the 163 plaintiffs.

**[50]** We are of the view that the judgment in suit 143 is in respect to the interlocutory application for the plaintiffs' solicitors to discharge themselves. In the course of the hearing of the application, there was extensive evidence

adduced to show the involvement of the plaintiffs, the first and fourth defendants, and the 13 appellants in Suit 228 and Suit 106. However, that does not mean that this court should infer knowledge of the 13 appellants regarding their involvement in Suit 228 as representatives of the estate of the two deceased Tok Batins to the extent that it relieves the plaintiffs from its onus of having to serve the substitution order and the amended writ and amended statement of claim dated 3 April 2013 on the 13 appellants.

**[51]** We agree with the submissions of learned counsel for the 13 appellants that it is a breach of the rules of natural justice for the order dated 22 December 2016 to be made binding on the two Tok Batins who have passed away, and on their estate who have not been served with the substitution order, or the amended writ and amended statement of claim dated 3 April 2013.

**[52]** There is the plethora of authorities which have held that any order made in breach of the rules of natural justice may be impeached in any proceedings, and is a nullity.

**[53]** In *Badiaddin Mohd Mohidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393 the Federal Court at p. 93 (CLJ); p. 409 (MLJ) stated:

> The Privy Council through Lord Diplock also emphasised that the **courts in England have not closed the door** as to the type of defects in the final judgment of the court that can be brought into the **category that attracts *ex debito justitiae* the right to have it set aside without going into the appeal procedure, 'save that specifically it includes orders that have been obtained in breach of rules of natural justice'**. Similarly in this country, the statement of Abdoolcader J (as he then was) in *Eu Finance Bhd v. Lim Yoke Foo* [1982] 2 MLJ 37 at p 39 provides the correct guideline on the subject:
>
> > *The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court* or tribunal and whenever it is relied upon ... in other words, it is subject to collateral attack. In collateral proceedings, the court may declare an act that purports to bind to be non-existent. In *Harkness v. Bells' Asbestos and Engineering Ltd* [1967] 2 QB 729, Lord Diplock LJ (now a Law Lord) said (at p. 736) that 'it has been long laid down that *where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside*'. (emphasis added)

**[54]** In *Muniandy Thamba Kaundan & Anor v. Development & Commercial Bank Berhad & Anor* [1996] 2 CLJ 586; [1996] 1 MLJ 374, the appellants claimed that they had not been served with a notice of the adjourned hearing. The Federal Court, in allowing the appeal, *inter alia*, held:

A (1) The rule that the court has no power under any application in the action to alter or vary a judgment after it has been entered or an order after it has been drawn up, except insofar as is necessary to correct errors in expressing the intention of the court, is subject to exceptions, one of which is that an order which is a nullity, owing to the failure to comply with an essential provision such as service of process, can be set aside by the court which made the order in the exercise of its inherent jurisdiction (see p 381A-C); *Craig v. Kanssen* [1943] 1 All ER108 and *United Malayan Banking Corp Bhd v Sykt Perumahan Lunas Sdn Bhd* [1988] 1 MLJ 546 followed.

B

…

C (4) The effect of the failure on the part of the first respondent to notify the appellants of the date of the adjourned hearing was of such fundamental importance as to render each and every one of the ex parte orders obtained a nullity (see p 383D); *White v. Weston* [1968] 2 All ER 842 followed."

D **[55]** In *Zulkiflee Adul Samad v. Segi Objektif (M) Sdn Bhd* [2016] 1 LNS 1488; [2016] MLJU 1333, the Court of Appeal, *inter alia*, stated in para. [9], "(iii) declaratory prayers ought not be granted if all necessary and interested parties are not before the court".

E **[56]** In *Ang Game Hong & Anor v. Tee Kim Tian & Ors* [2018] MLJU 449, Court of Appeal in para. 29 stated:

> Further we were of the view that it is fundamental principle of natural justice, applicable to all courts that a order made without an interested party being given the opportunity to be heard is liable to be set aside *ex debito justitiae* and must be held as void. See *Cameron v. Cole* [1944] 6 CLR 571."

F

**[57]** Under O. 15 r. 9 of the ROC, the court has powers to strike out an action against a plaintiff or defendant who has died. We are of the considered view that the learned judge had erred in proceeding with the trial for Suit 228 knowing full well at the commencement of the trial that the appeal of the G plaintiffs in respect of their application for the substitution order was still pending at the Court of Appeal. Subsequently, upon being notified that the Court of Appeal had granted the substitution order to the plaintiffs, the learned judge did not give any directions to ensure that the representatives of the estate of the two deceased Tok Batins were in court before making the H order dated 22 December 2016 against them. Such an order made in breach of the rules of natural justice is therefore a nullity.

**[58]** For the above reasons, we make the unanimous decision that Appeal 220 is allowed with costs. The decision and order of the High Court are set aside. The plaintiffs' claim against the two Tok Batins, ie, the second and I third defendants, and/or their estate, is in effect therefore dismissed.

*Effect Of This Decision Regarding Appeal 220 On Appeal 219 And Appeal 221*

**[59]** With the decision of this court on Appeal 220, the estate of the two deceased Tok Batins would not be bound by the order of the High Court dated 22 December 2016, and be subject to execution proceedings thereof. However, this decision does not affect the consideration of this court of the evidence as a whole in Suit 228 in deciding Appeal 219 and Appeal 221, including any evidence on the role of either or both of the two Tok Batins *vis a vis* the plaintiffs, and the other appellants.

## Appeal 219 And Appeal 221

*The Position Of The First Defendant*

**[60]** Before dealing with Appeal 219 and Appeal 221, it is appropriate for us at this juncture to place it on record that the first defendant had in fact filed two appeals against the decision of the High Court in Suit 106 and Suit 228, namely Appeal No. J-02(W)-222-02/2017 ("Appeal 222"), and Appeal No. J-02(NCVC)(W)-223-02/2017 ("Appeal 223") respectively. However, due to the lack of sanction from the Director General of Insolvency being obtained by the first defendant, who is now a bankrupt, to maintain these two appeals, the two appeals were previously struck out by this court on 11 December 2017, and on 14 November 2017 respectively. Regarding Appeal 223, the first defendant's application for leave to appeal was struck out by the Federal Court on 26 September 2018. Regarding Appeal 222, similarly the first defendant's application for leave was heard by the Federal Court on 29 October 2018 and struck out. Therefore, as it stand snow,insofar as Suit 228 is concerned, the first defendant is bound by the decision of the High Court in that suit, and by the orders of this court regarding Appeal 219 and Appeal 221 where they relate to him, whether as an individual or as a partner of the legal firm, ie, the fourth defendant (or "the firm").

**[61]** Since the first defendant's two appeals have been struck out by this court, the effect is that the first defendant, having being found liable by the High Court, continues to be liable to date. Thus, any finding and decision by the High Court regarding the first defendant's liability, as a sole proprietor of the firm, and later as a partner of the firm after it became a partnership in 2004 when Dinesh joined the firm as a partner, would continue to bind the first defendant as a partner. This court will also deal with the principle of the "continuing obligation" of a partner later on in this judgment.

*The Scope Of Appeal 219 And Appeal 221*

**[62]** Pursuant to the High Court order given by Moktar Siddin J (as he then was) dated 5 June 2000 in OS 828, the total judgment sum of RM38,554,111.92 ("actual compensation") was made in favour of the 52 Orang Asli. The same learned judge also made an order as stated earlier in para. 10 of this judgment regarding payment of the actual compensation of RM22,000,000 and the establishment of the Trust for 25 years under the

A Trust deed with Kanawagi, Tok Batin Adong, and Abdul Rahman as the first trustees, and the DG of JHEOA as an additional trustee. The balance of the RM16,554,111.92 was to be paid to the firm, or the fourth defendant, to be distributed to the 52 Orang Asli after deducting all legal fees, costs, consultation fees and expenses incurred for the purpose of, and in connection
B with the case.

**[63]** The appellants contended that the plaintiffs are seeking for proper audited accounts to be rendered in respect of only the sum of RM16,554,111.92, and not for other sums.

C **[64]** We note, however, that in the plaintiffs' prayers for reliefs in Suit 228 they had prayed, *inter alia*, for:

(i) an audited statement of account on the RM16,554,111.92 to be given by the first and fourth defendants to the HSBC trustees (para. 83.3F(m));

D (ii) an audited statement of account with respect to the RM22,000,000 to be given by the first and second defendants to HSBC trustees (para. 83.3F(q));

(iii) as regards the sums received by the third defendant, the third defendant is to provide an account of all monies paid out to him by the first defendant and/or fourth defendant within two days of the order;

E

(iv) special damages as follows:

(a) judgment for RM1,000,000, which is to be paid to HSBC trustees and to be placed in the Trust;

F (b) judgment for RM2,200,000 to be paid to HSBC trustees to be placed in the Trust; and

(v) damages to be ordered to be paid by the first to fourth defendants.

**[65]** In the order dated 22 December 2016, we further note that the High
G Court had ordered, amongst others, the following sums to be paid under the heading of "damages" in para. 32(ii) of the judgment in Suit 228:

(ii) Damages:

(a) The Defendants including Dinesh Kanavaji pay the sum of RM16,054,111.92 to the beneficiaries of the Trust;

H (b) The Defendants including Dinesh Kanavaji pay the sum of RM2,716,920.00 to the Trust;

(c) The Defendants including Dinesh Kanavaji pay the sum of RM1,057,340.33 to the Trust;

I (d) The Defendants including Dinesh Kanavaji pay the sum of RM865,072.04 to the Trust;

(e) The Defendants including Dinesh Kanavaji pay the sum of RM27,863.31 to the Trust;

(f) The Defendants including Dinesh Kanavaji pay the sum of RM40,000.00 to the Trust;

(g) The Defendants including Dinesh Kanavaji pay the sum of RM5,000,000.00 to the Plaintiffs based on their conduct in abusing and mismanaging the Trust funds involving millions of Ringgit.

**[66]** From the plaintiffs' pleadings, it is clear that the scope of Suit 228 is not limited to only the RM16,554,111.92, but covers the sum of RM22 million, and all other sums stated in the prayers for relief, including the other specific sums of payment which the learned judge had ordered under the heading of "damages".

*Whether The Plaintiffs' Claim Is Time-barred*

**[67]** The fourth defendant submitted that the plaintiffs' claim for accounts from 2000, 2001, 2002 and for the year 2003 is caught by the following s. 6(2) of the Limitation Act 1953 which provides a time bar of six years for any action to commence for an account:

> An action for account shall not be brought in respect of any matters which arose **more than six years** before the commencement of the action.

With respect, we do not think that the plaintiffs' claim is time-barred by virtue of s. 22(1) and (2) of the Limitation Act 1953 which provide as follows:

> 22. Limitation of actions in respect of Trust property.
>
> (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a Trust, being an action
>
> (a) in respect of any fraud or fraudulent breach of Trust to which the trustee was a party or privy; or
>
> (b) to recover from the trustee Trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.
>
> (2) Subject as aforesaid, an action by a beneficiary to recover Trust property or in respect of any breach of Trust, not being an action for which a period of limitation prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued:
>
> Provided that the right of action shall not be deemed to have accrued to any beneficiary entitled to a future interest in the Trust property, until the interest fell into possession.

**[68]** Contrary to what learned counsel for the appellants submitted, even though the plaintiffs' action is not based on fraud, we note that the cause of action is for breach of trust and constructive trust which resulted in misuse, mismanagement and misappropriation of Trust funds (paras. 68-70 of amended statement of claim). Therefore, pursuant to s. 22(1)(a) and (2) of the

Limitation Act 1953, the plaintiffs' claim is not barred by the limitation of six years. Furthermore, for as long as the audited accounts are not rendered to the plaintiffs, the R & M, and/or the trustee to be appointed by the court, it is a continuing cause of action involving a running account of the subject monies which survives the limitation of six years.

*The Issue On Res Judicata*

**[69]** The appellants submitted that the learned judge had overlooked that the order dated 5 June 2000 in OS 828 is a final order by the previous High Court which is a competent court of unlimited jurisdiction, and it therefore prohibits the present High Court from reopening the case based on the principle of *res judicata*.

**[70]** With respect, we are of the view that this issue raised by the appellants is a non-starter and devoid of merits. As submitted by learned counsel for the plaintiffs, the present High Court was not varying the order dated 5 June 2000, but was in fact giving effect to it, to ensure that the Trust monies are kept intact, and not misused, misappropriated or dissipated. The cause of action in Suit 228 is for breach of fiduciary duty of the first trustees, including the constructive trustees ie, the fourth defendant, whereas the cause of action in OS 828 is for the placement of the actual compensation, and the establishment of the Trust, and all matters related thereto. *Res judicata* would in no way apply to Suit 228.

*The Issue On Tracing The Sum Of RM16,554,111.92 And All Other Sums Belonging To The Trust Fund*

**[71]** The appellants submitted that the sum of RM16,554,111.92 was disbursed by the fourth defendant, with the consent of the two Tok Batins and Abdul Rahman, as follows:

(i) RM6,650,000 paid to Senior Counsel, Dato' R Rajasingam, being the fees where the sum has been accounted for by the defendants (CB Jld 2 p. 014195). Dato' R Rajasingam's affidavit affirmed on 29 May 2011 confirmed that he received this sum as his legal fees and expenses in the year 2000 (tab U ikatan teras perayu);

(ii) RM500,000 paid to Senior Counsel, Dato RR Sethu, on 21 July 2010 where the sum has been accounted for by the defendants (CB Jld 2 p. 014195). Dato' RR Sethu's affidavit affirmed on 5 April 2011 confirmed that he received this sum as his professional fees in the year 2000 (tab V ikatan teras perayu);

(iii) RM4,554,111.92 paid to the firm/fourth defendant on 26 August 2010 where the sum has been accounted for by the defendants (CB Jld 2 p. 014195). Kanawagi's witness statement filed in these proceedings whereby he confirmed receipt of this sum as his legal fees in the year 2000 (tab W ikatan teras perayu);

(iv) cheque amounting to RM2,200,000 issued to Hamzah's wife, Saadiah bte Abd Manaf ("Saadiah"), on the instruction of the two Tok Batins and Abdul Rahman (CB Jld 2 p. 014195). Hamzah's witness statement filed in these proceedings whereby he confirmed receipt of this sum paid in favour of his wife for his assistance rendered and for introducing the two Tok Batins to Kanawagi (tab X ikatan teras perayu);

(v) the two Tok Batins (second and third defendants) in their affidavit affirmed on 18 January 2010 confirmed receipt of RM2,650,000 (after deducting the amount requested to be paid to Hamzah) in the year 2000, to be distributed to the Orang Asli (tab BB ikatan teras perayu);

(vi) the evidence of the R & M, under cross examination at the trial whereby he confirmed that the sum of RM16,554,111.92 had been fully expended by the firm/the fourth defendant in the year 2000 (see notes of evidence in RR Bersama Bhgn B Jld 4 p. 680, and RR Bersama Bhg B Jld 5 pp. 933-937).

**[72]** Learned counsel for Dinesh submitted that at all material times, Khana & Co was a sole proprietorship with Kanawagi as a sole proprietor. Dinesh only joined Khana & Co in the year 2004. All the monies were fully disbursed by Khana & Co in the year 2000. There is no question of Dinesh having benefited from the same when he joined the firm in 2004. Dinesh therefore cannot be held liable for restitution of these monies.

**[73]** In regard to the sums in para. 71 above, the appellants submitted that these payments were the subject matter of a criminal case for the offence of criminal breach of trust ("CBT") under s. 409 of the Penal Code (11 charges), and for the offence of money laundering under s. 4(1)(a) of the AMLA (46 charges) against the first defendant, and against Dinesh for abetment of the first defendant in one CBT charge, and three AMLA charges in the Sessions Court. However, the first defendant and Dinesh were acquitted at the end of the prosecution case without the defence being called.

**[74]** The appellants relied heavily on a document marked D234 which was the statement of agreed facts ("SOAF") in the criminal case against the first defendant and Dinesh (see judgment regarding Kuala Lumpur Sessions Court Arrest Case No. 62-(292-296)-83/2012, 62-(922-937)-11/2011 in RR Bersama Bhg B Jld 54 pp. 010234 to 010281) where the Deputy Public Prosecutor had signed in agreement to the SOAF (RR Bersama Bhg C Jld 100 pp. 018122-018129 ie, statement of agreed facts for the criminal case referred to in the witness statement of Dinesh) on the various payments out of the sum of RM16,054,111.92 for the legal fees of Dato' R Rajasingam, Dato' RR Sethu, and Khana & Co, and to Hamzah and his wife, and to the two Tok Batins and Abdul Rahman for distribution to the Orang Asli.

**[75]** In this respect, we note that document D234 was merely marked as a SOAF in the criminal court. However, in the present civil proceedings, D234 should not be marked as an exhibit since its contents were seriously challenged by the plaintiffs.

**[76]** We are of the view that the marking of the SOAF as D234 in the criminal proceedings does not relieve the appellants from the burden of having to prove the truth of the contents of the said document in the present civil proceedings. This is more so since the plaintiffs do not agree that D234 is a SOAF which can apply to the present civil case. In this respect, s. 43 of the Evidence Act 1950 ("EA") would apply, which means that any judgment, order or decree other than those mentioned in ss. 40, 41 and 42 of the EA, are irrelevant unless the existence of such judgment, order or decree is a fact in issue or is relevant under some other provision of the EA.

**[77]** From the manner that the learned judge considered the various issues to be tried, it is obvious that he was not satisfied that the payment made as stated in D234 are to be accepted at face value. We do not think that he had erred on this point.

**[78]** After considering all the evidence adduced before him, the learned judge made specific findings which included the following.

**[79]** The first trustees appointed by the court ie, the first defendant, Abdul Rahman (not a party), and the second defendant, being trustees, owe a fiduciary duty to the plaintiffs.

**[80]** *Vide* the order dated 5 June 2000 in OS 828, the trustees shall also comprise the DG if he is willing to accept the office.

**[81]** Both parties submitted extensively on whether the DG was in the first place invited to be trustee of the Trust. In our view, it is not material whether the DG was invited or otherwise by the first trustees to be a trustee. The learned judge rightly concluded that since the DG was not a trustee, the Trust was in fact not properly constituted.

**[82]** We are of the opinion that without the DG being made a trustee as required by the order dated 5 June 2000, the first trustees ought to have applied to the court for liberty to dispense with the mandatory requirement of having the DG acting as a trustee. We observe that this was not done. Thus the learned judge was not wrong when he held that the first trustees had a free hand over the actual compensation which was paid entirely out to the fourth defendant by the Johor State Government. They had not rendered proper audited accounts of all payments made and therefore they had breached their fiduciary duty to the plaintiffs who are beneficiaries to the Trust. Further, they had beached the Trust when they committed various acts which amounted to misuse, mismanagement and misappropriation of the Trust fund.

**[83]** Pursuant to cls. 8.1 and 8.2 of the Trust deed, the trustees were required to prepare by a certified public accountant certified financial statements in each financial year, and shall establish and maintain proper accounts in books or computer from which shall be recorded accurately all receipts and outgoings, income and capital in relation to the Trust fund. However, this was not done. Initially, the first defendant merely gave photostat copies of payment vouchers and no other documents or originals.

**[84]** The learned judge rightly concluded that the fourth defendant is a constructive trustee of all the Trust funds which were disbursed through the firm. The fourth defendant therefore owes a fiduciary duty to the plaintiffs as beneficiaries. Further, the first and fourth defendants, by virtue of them being the solicitors for the plaintiffs in OS 828 owe a fiduciary duty to the 21 plaintiffs therein who form part of the 52 Orang Asli.

**[85]** The learned judge made a finding that the first defendant, when testifying, could not produce evidence of the third defendant being appointed as a trustee. Despite that, the third defendant was held out to be a trustee of the Trust and he signed various documents which affected the Trust such as the memorandum of understanding ("MOU") (pp. 1692 – 1701 of D8), each copy of the sale and purchase agreements for the 27 units of apartments (pp. 158 – 366 of D2 and 367 – 560 of D3) (note: this is the subject matter of Suit 106), letters from the Trust to Messrs Sharifah & Associates (p. 654 of D4 and p. 1675 of D8), letters from the Trust to Virgin Properties (pp. 1621 and 1685 of D8)(virgin properties is defendant in Suit 106), and resolutions of the trust dated 21 January 2008 and 14 July 2007 (pp. 591 and 592 of D3), which the learned judge correctly ruled as void.

**[86]** In addition, the learned judge found that the third defendant had allegedly affirmed statutory declarations, together with the second defendant and Abdul Rahman that he received trust monies amounting to RM3,639,671.60, purportedly to be distributed to the beneficiaries of the Trust (exhs. D48, D49, D50, D51, D52, D53, D54A and D54B). The learned judge found that it was odd that the third defendant received Trust monies when he was not entitled to such monies. Therefore, the third defendant had been unjustly enriched. The learned judge concluded by holding that the first and second defendants, as trustees, were to be jointly and severally liable for the sum of RM3,639,671.60.

**[87]** Based on the evidence, the learned judge further found that since the inception of the Trust, the plaintiffs have requested for information and accounting on the Trust from the first defendant (as trustee), and from the fourth defendant (as constructive trustee), on the details of the actual compensation which consists of the sum of RM22,000,000 constituting the Trust, and the sum of RM16,554,111.92.

**[88]** In regard to the MOU (exh. P83), we note the submissions of the plaintiffs that it is an incomplete document produced in court. Clauses 7 and 8 of the MOU refer to "lampiran A" which was not produced in court.

**[89]** The learned judge held that the MOU is an afterthought and was fabricated by the appellants. It was not mentioned in the defence. The first defendant, under cross-examination, stated that the MOU was destroyed in the fire which happened at the fourth defendant's office in May 2007 (NOP Vol 43 p. 62 and pp. 90 – 95). In fact, the learned judge observed that the MOU was not even produced by the first defendant when he had to justify the defendants' position with regard to the RM16,554,111.92 to the proceedings of the Advocates and Solicitors Disciplinary Board which was set up in 2004. In any case, the learned judge found that the MOU is illegal and thus void since it contemplates payment of legal fees only in the event of success in any suit, action or proceedings and this is contrary to s. 112(1)(b) of the Legal Profession Act 1976.

**[90]** The learned judge emphasised that the defendants have a duty to properly account for all sums billed, and cannot simply make lump sum payments without proper invoices for any service allegedly rendered.

**[91]** The learned judge could not accept the alleged vouchers produced by the defendants which stated lump sums, but do not show any details of work done. He found the alleged vouchers highly suspect, as they did not bear the letterhead of the fourth defendant, Dato' R Rajasingam and Dato' RR Sethu (NOP Vol 43 pp. 79 – 107).

**[92]** The learned judge further noted that the defendants failed to provide any details on the alleged foreign consultants who were apparently engaged to provide assistance in OS 828 (NOP Vol 43 pp. 123, and NOP Vol 44 pp. 29 – 32).

**[93]** More importantly, the learned judge found that the defendants did not provide any evidence that consent was obtained from the plaintiffs for the monies to be paid to the fourth defendant, Dato' R Rajasingam, Dato' RR Sethu, and the alleged foreign consultants.

**[94]** We are also of the view that the learned judge was correct when he concluded that the defendants had no authority to make payment of RM2,200,000 out of the RM16,554,111.92 to Hamzah and his wife, Sa'adiah, for two reasons:

(i) the Trust order only allowed for payment of "legal fees, costs, consultation fees and expenses". There is no evidence that Hamzah is a lawyer or a consultant who should be entitled to such payment, more so when there was no legitimate invoice or bill to require such monies to be paid. The learned judge considered the evidence of Hamzah himself when he testified that there was an agreement to pay him 15%

of the compensation awarded. He stated that he helped the Orang Asli to write several letters, and he drove the Tok Batins to Kuala Lumpur several times (NOP Vol 52 pp. 76 – 80);

(ii) the defendants never obtained the consent of the 52 Orang Asli regarding this payment.

In light of all the evidence adduced, we do not think that the learned judge had erred in holding that the defendants had misused, mismanaged and misappropriated Trust funds.

**[95]** Further, the learned judge found that the accounts that were finally furnished by the defendants to the plaintiffs were unaudited/uncertified financial statements which contained a qualification by the defendants' accountant that the accounts were unaudited (respondents' core bundle (1) p. 401).

**[96]** The plaintiffs then engaged Folks Corporate Services Sdn Bhd ("Folks") to furnish a report as to their opinion on the defendants' unaudited accounts. The learned judge considered the report prepared by Folks (exh D43) and noted the findings of Folks which, *inter alia*, stated:

(i) that between the year 2000 to 2006, the unaudited/uncertified financial statements of the defendants stated that the sum of RM5,511,457 was paid to the beneficiaries. However, a sum of less than RM2,778,300 was instead received by the beneficiaries;

(ii) that no details of legal fees, costs, consultant fees and expenses with regard to the payment of RM16,554,111.92 as legal fees (45.29% of the actual compensation) have been furnished by such unaudited accounts;

(iii) that a sum of RM2,716,920 was not accounted for. This sum was purportedly paid to the three village headmen, ie, the two Tok Batins and Abdul Rahman, for distribution to the beneficiaries. However, the plaintiffs, as beneficiaries, were not aware of it, and have not received such sums.

**[97]** The learned judge stated that the defendants have failed to account for the RM16,554,111.92 which was paid into the fourth defendant's account on or about 13 July 2000. It is the plaintiffs' case that there was an agreement between the first defendant and the two Tok Batins and Abdul Rahman which entitled the first defendant to legal fees of only RM500,000, and not RM4,554,111.92 as he was paid, should he win the case in OS 828. We are of the view that the learned judge is correct to hold that the defendants are required to account for the balance from the RM16,054,111.92.

**[98]** The sum of RM2,716,920 was the excess interest derived from the Trust fund of RM22,000,000 every month. The learned judge made a finding that there was also a standing instruction by the first defendant for Agro Bank to transfer the remainder of each month's interest, derived from such Trust fund, into his personal account (NOP Vol 42 p. 10). In our view, it is clear from the evidence adduced by the plaintiffs that there is no accountability, and no proper audited accounts submitted to the Trust of the RM22 million, including all interests earned on such amount, by the first trustees, in particular the first defendant, and by Khana & Co.

**[99]** Based on the evidence, we are of the considered opinion that the learned judge did not err in fact or in law in deciding that the defendants owe a fiduciary duty, whether as trustees or constructive trustees, to the Trust, and they have beached such fiduciary duty. Therefore, they are liable for all sums which have been misused, mismanaged and/or misappropriated from the Trust funds, and the defendants are liable to reimburse the Trust all such sums. However, in our view the exact sums payable to the plaintiffs have to be identified and confirmed from audited accounts of the same.

**[100]** The learned judge also made a finding that sometime in 2008, RM7,000,000 was withdrawn out of the Trust fund and used to purchase 27 units of Lanai Gurney Apartment. In fact, the learned judge stated that there is no dispute on this.

**[101]** At this juncture, we wish to state in clear terms that the matter regarding this sum of RM7,000,000, and the plaintiffs' claim on the 27 units of apartments, and an additional 30 units, will be dealt with in a separate judgment of this court on the remaining five appeals filed against the decision of the same learned judge in respect of Suit 106.

*The Liability Of The Parties In The Firm/Fourth Defendant, Including Dinesh*

**[102]** The appellants' position is that the sum of RM16,554,111.92 paid by the Johor State Government to the fourth defendant was already distributed in the manner as stated in para. 66 of this judgment.

**[103]** The appellants therefore contended that the aforesaid sum of RM16,554,111.92 was fully disbursed by 26 August 2000 as set out above, and thereafter the role of the first defendant and the fourth defendant, as solicitors for the Orang Asli, came to an end.

**[104]** Dinesh maintained that he only joined the firm, Khana & Co, ie, the fourth defendant, as a partner on 2 January 2004, and he had no involvement in the firm prior to that. The subject monies were deposited by the firm and thereafter disbursed fully by 26 August 2000 before Dinesh joined the firm as a partner. Thus, any cause of action against the firm, if at all, arose when Dinesh was not a partner of the firm.

*The Law Of Partnership*

**[105]** Section 11 and s. 19(1) of the Partnership Act 1961 ("PA") provide as follows:

s. 11:

"Every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm **incurred while he is a partner**; and after his death his estate is also severally in a due course of administration for such debts and obligations, so far as they remained unsatisfied but subject to the prior payment of his separate debts." (emphasis added)

s. 19(1):

"A person who is admitted as a partner into an existing firm **does not thereby become liable** to the creditors of the firm **for anything done before he became a partner**. (emphasis added)

**[106]** Dinesh therefore submitted that pursuant to s. 11 and s. 19(1) of the PA, he is not liable for all the debts and obligations of the firm regarding the sum of RM16,554,111.92, and even for the RM22,000,000. Since any liability incurred before he was a partner, he cannot be liable for anything done before he became a partner.

**[107]** We note, however, that the learned judge, after considering s. 11 of the PA, held that while the general proposition of the law would not hold Dinesh liable for the liabilities of the fourth defendant prior to his joining the same as a partner, the exception for the rule is found in the Court of Appeal case of *Oriental Bank Bhd v. Nordin Hamid & Ors* [2011] 5 CLJ 237 where Zaharah Ibrahim JCA (as she then was) at p. 252 stated as follows:

With respect, I am not persuaded by this argument. It is true that when the legal firm received the monies from the High Court and the District Land Administrator the fourth respondent then was not yet a partner of the firm. However, it is significant to note that, even after the fourth respondent had joined the legal firm on 1 June 1996, the monies were still not handed over to the rightful owner, the appellant; and the monies (except in respect of the net proceeds of the account of Faridah which were remitted to the appellant very late on 23 December 1997) were still not remitted to the appellant even after two notices of demand were issued, namely (1) by the appellant's Head of Legal Unit on 14 January 1998, and (2) by the appellant's solicitors on 28 June 1999. In my judgment, in the circumstances of the case, the fourth respondent is still liable in respect of the firm's obligation to make restitution to the appellant by reason of s. 11 of the Partnership Act. The legal obligation of the legal firm to make restitution did not cease at the time the fourth respondent joined the legal firm (1 June 1996). So long as the monies were not remitted to be appellant, meaning that so long as the legal obligation to make restitution in respect of the net proceeds was not carried out by the legal firm, that legal obligation persists; and that legal obligation was still

A continuing at the time the fourth respondent joined the firm on 1 June 1996, and even thereafter. In my judgment, the phrase 'obligations of the firm incurred while he is a partner' in s.11 of the Partnership Act ought to be interpreted to include this continuing obligation. In interpreting s. 11, it must be borne in mind that the legal firm benefited by retaining the appellant's monies. The legal firm was a partnership. The fourth B respondent was a partner in that partnership with effect from 1 June 1996. Thus, he too, as a partner of the firm (the partnership), benefited from the unlawful retention of the monies from the day he joined the partnership. Therefore, it would not be justified if s.11 were to be narrowly interpreted in a manner that would absolve the fourth respondent from the firm's legal obligation to make restitution in respect of those monies. C

**[108]** Learned counsel for Dinesh cited a few authorities before us to support his proposition that an individual partner is only liable for debts and/or obligations of the firm that were incurred during the period in which he was a partner of the firm and the cause of action arose (see High Court D cases of *Leong Sing v. Perusahaan Kuari (Melaka Pindah) Sdn Bhd & Another Case* [1997] 1 CLJ 307; [1997] 5 MLJ 657, and *Guthrie Property Development Holding Bhd v. Baharuddin Hj Ali & Ors* [2010] 6 CLJ 218; [2011] 3 MLJ 416, and the India case of *Noor Mohammed v. Hill Produce Trading Co, Badagara & Ors* [1980(1)] India Law Report 303].

E **[109]** From the authorities cited by both parties, we would highlight two Court of Appeal decisions.

**[110]** In *Lee Choon Hei v. Public Bank Bhd & Another Appeal* [2017] 7 CLJ 438, Harmindar Singh JCA stated as follows:

F it must follow that the Plaintiff does not need to prove all over again all the causes of action that are merged in the judgment against the firm because the nexus between the appellant and the judgment is the all-important fact that the appellant was a member of the firm at the time when the plaintiff's cause of action accrued against the firm. Thus, as soon as the plaintiff shows that the appellant was a member of the firm G when the cause of action accrued, the appellant is liable.

**[111]** In *Alan Michael Rozario v. Merbok MDF Sdn Bhd* [2011] 1 CLJ 433, at p. 443 Segara JCA stated as follows:

Notwithstanding the statutory declaration of the first defendant admitting that she is wholly to account for the RM1 million, and H attempting to absolve and exonerate the second defendant of any wrong doing over the Stakeholders Money, it is undisputed that when the Stakeholders Money was paid into the account of Suhaiza & Partners and subsequently withdrawn, the second defendant was a partner of the legal firm.

I We are unanimous that the allegations that the second defendant was not an equity partner of the main branch of the legal firm and that he had no knowledge of the matter, does not absolve him in law, under the Partnership Act 1961, of his liability as a partner of the firm of Suhaiza & Partners, at the material "time".

**[112]** In the *Law of Partnership in India* (5th Revised edn) by SD Singh, JP Gupta and VP Verma, the learned authors, when dealing with the liability of a partner, at p. 389 stated the following: A

> The liability of a partner commences only from the time he becomes a partner. He cannot as such be held liable prior to the date he became a partner. Similarly the firm also cannot be held liable for the acts of a partner before he became member of the firm. B

**[113]** We are in agreement with the principles set out in the authorities cited by learned counsel for Dinesh. However, we do not agree with his submission that the decision in *Oriental Bank (supra)* was decided *per incuriam* because the Court of Appeal in that case appears to suggest that C in certain circumstances, an incoming partner can be liable for an existing debt of a partnership firm, and the Court of Appeal made no reference whatsoever to s. 19(1) of the PA in coming to its decision.

**[114]** Learned counsel for Dinesh further submitted that in our present case, D the firm had already received the sum of RM16,554,111.92 and such sum had already been disbursed in full, well before Dinesh joined the firm as a partner. There was therefore no question of Dinesh having benefited from the monies as was the case in *Oriental Bank (supra)*.

**[115]** With respect, we do not think that the Court of Appeal had decided E *Oriental Bank (supra) per incuriam*. The facts of that case are such that there clearly arose a continuing obligation of the partner as spelt out by the court in that case. In our opinion, in the present case, the learned judge did not err in deciding that there is a continuing obligation by the fourth defendant to compensate the plaintiffs for all losses incurred as a result of the firm's refusal F and/or failure to account for the RM16,554,111.92. We agree with the submissions of the plaintiffs that the failure by the firm to account for sums received on behalf of its client in its accounts does not cease to exist by virtue of the incoming or outgoing of an individual.

**[116]** Section 12 of the PA provides that the firm, as opposed to an G individual partner, is under an obligation to make good any loss or injury caused to any person acting in the course of the business of the firm. It reads as follows:

> Liability of firm for wrongs
>
> 12. Where, by any **wrongful act or omission of any partner acting in the ordinary course of the business of the firm** or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefore to the same extent as the partner so acting or omitting to act. (emphasis added) H

**[117]** Thus, in our view for as long as sums which rightfully belong to the I Trust fund are not paid back by the fourth defendant, and for as long as audited accounts are not rendered by the fourth defendant to the plaintiffs, the firm, together with its partners including Dinesh, are liable for such debts

and/or obligations even if Dinesh only joined the firm on 2 January 2004. In our view, from 2 January 2004 onwards, Dinesh is liable as a partner for any act or omission which is the legal obligation of the firm for as long as such obligation has not been discharged.

**[118]** In this respect, we agree with the following submissions of learned counsel for the plaintiffs:

> 87. To adopt a different interpretation of the provisions of the Partnership Act 1961 would produce an absurd and unjust result. This would allow partnership firms to escape liability if a culpable partner leaves the firm to be replaced by an incoming partner who would have the free hand of "unknowingly" benefitting from the monies that remain in the accounts of the said firm – by simply invoking section 19. As per Hishammuddin J (as he then was) in RBOA Vol. 4(2) Tab 25, *Southern Empire Development Sdn Bhd v. Tetuan Shahinuddin & Ranjit & Ors* [2008] 5 CLJ 195:
>
> [17] In my judgment, because in law the liability of the firm is distinct from that of the partners, therefore, the liability of the firm is not affected by any partner ceasing to be a partner of the firm. Although the particular errant partner has long left the partnership, the liability of the firm still continues – subject only to any law pertaining to limitation of actions.
>
> [18] This, to my mind, must be the correct interpretation of the law pertaining to partnership; otherwise there will be chaos in the commercial world; for, if the first defendant's proposition were to be accepted, then a partnership which has incurred a liability can easily exonerate itself from that liability simply by asking the particular errant partner in question to leave the firm. Surely, this cannot be the law.
>
> 88. In the present case, the RM16 million was not entrusted specifically to the first Appellant as trustee but to the firm, the 4th Appellant. The obligation of the firm therefore remains until the sum is repaid. Zaharah Ibrahim JCA (now CJM) in *Oriental Bank* Bhd:
>
> [62] *In this case, the money was not enTrusted to any particular partner as trustee. It was received by the firm. It is in the context of receiving the money and holding the money on behalf of the appellant with an obligation to hand over the money to the appellant that the "Trust" arose. In fact, in para. 16 of their amended statement of defence, the second and third respondents admit that their role was as trustees ("memegang peranan sebagai pemegang amanah").*

**[119]** Thus, as constructive trustees, the firm, including Dinesh, are liable as decided by the learned judge. We do not think that the learned judge had erred in stating "including Dinesh" in several instances in his judgment when he found the fourth defendant liable. In our view, the learned judge was placing on record his findings of fact on Dinesh's involvement and liability as a partner. However, we do not think that the words "including Dinesh" must necessarily be stated in the court order. This is because by operation of the law of partnership, any reference to the fourth defendant, which is a

partnership, would automatically bind all its existing partners at the material time, including Dinesh. We are informed that the firm has been closed down. Nonetheless, the obligations and liability of its partners will continue until they are fully discharged.

**Whether The Judgment Ought To Be Impugned**

**[120]** The appellants submitted extensively at the outset of this hearing that the judgment of the High Court ought to be impugned for the reason that the learned judge considered mainly the submissions of the plaintiffs and adopted extensively those submissions as his judgment, without giving due consideration to the evidence and submissions of the appellants. The appellants submitted "annexure A3" (in yellow) (note: p. 1 of Annexure A3 was withdrawn in court by Mr TA Sivam, learned counsel for the appellants, on 11 July 2018) to show the various parts of the judgment where the learned judge had adopted almost wholly or a greater part of the submissions of the plaintiffs, and had only added very few of his own words which were highlighted to this court in pink. They further submitted a comparative chart to show four examples of where the learned judge had failed to consider the defendants' submissions.

**[121]** The leading authority on this issue, and whether miscarriage of justice has been caused by extensive adoption of mainly one party's submissions can be found in the case of *Dato' See Teow Chuan & Ors v. Ooi Woon Chee & Ors And Another Appeal* [2013] 4 CLJ 901 where the Federal Court, in a review application, when deciding the issue of alleged copying or "plagiarism" by the court in its grounds of judgment, *inter alia*, stated the following:

> At page 918:
>
> [24] The Columbia Court of Appeal in that case allowed the appeal and ordered a new trial. However, the dissenting view of K Smith JA is highly relevant for our consideration where in paras 29 and 30 he said:
>
> > [29] The question, then, is whether a reasonable and informed person, considering all the circumstances, would apprehend that the trial judge failed to independently and impartially consider the evidence and the law and to arrive at his own conclusions on the issues.
> >
> > …
> >
> > [30] I would add that there is nothing inherently wrong with adopting the submissions of a party in whole or in part as reasons for judgment so long as those submissions truly and accurately reflect the judge's own independent analysis and conclusions. Trial judges are busy, and there can be cases, of which Gaudet and Ni-Met Resources Inc. are examples, where a party's submissions so accurately reflect the trial judge's reasoning that nothing would be gained by postponing other pressing work in order to rewrite the reasoning and conclusions in the judge's own words. However,

judges who are tempted to prepare reasons for judgment in this way should be acutely aware they may create a perception that they did not reach their decisions independently. Such a perception would tend to undermine public confidence in the impartiality and independence of the judiciary generally and would bring the administration of justice into disrepute: *R v. S(RD)* at para. 111.

[25] *The approach taken by K Smith JA is that, it does not follow that where the trial judge was found to have adopted the submissions of a party, the judgment should automatically be set aside. We need to consider further, whether on its proper analysis the judgment truly and accurately reflects the judge's own independent analysis and conclusions.*" (emphasis added)

At pages 921 and 922:

[29] A similar issue was raised before our Court of Appeal in the case of *Celcom (Malaysia) Bhd v. Mohd Shuaib Ishak* [2010]7 CLJ 808. In that case, the issue of wholesale copying of counsel submissions was raised as a point of appeal. Abdull Hamid Embong JCA (as he then was) approached the issue in the following manner:

> [4] Learned counsel for the appellant in the opening remarks of his submission criticised the judge for almost totally adopting the submission of the respondent as his grounds of judgment. A comparative table of the judgment matching with the parallel passages in the respondent's submission was presented to us to press home the point that the learned judge had completely ignored the submission of the appellant. While we do not approve of the method adopted by the learned judge in producing his judgment, we say that this itself cannot be basis to strike down that judgment, although it was strongly urged by the appellant, that judgment was flawed in not considering the counter arguments of the appellant. These flaws were presented to us as the grounds of this appeal which we now consider.

[30] *The Court of Appeal expressed its disapproval of the method adopted by the judge in substantially copying the submissions of counsel but held that in itself cannot form the basis to strike down the judgment. The court then went on to allow the appeal on substantive merit.* (emphasis added)

**[122]** Coming back to the present case, we have deliberately decided to address this issue of copying the plaintiffs' submissions towards the later part of this judgment, and not at the beginning, for the reason that as we go along in the consideration of the judgment with a fine toothed comb on all the issues, we are of the considered opinion that while it is true that the learned judge had adopted chunks of the plaintiffs' submissions in the court below, he did consider all the oral and documentary evidence adduced before him thoroughly and he did consider both the case of the plaintiffs and the case of the defendants in totality, and in great detail.

**[123]** We observe that the submissions of both parties are in English, whereas the learned judge had written the judgment in the Malay language. Thus, it cannot be said that the learned judge did wholesale copying of the

plaintiffs' submissions. In our view, he merely agreed with and therefore adopted more of the plaintiffs' submissions. We find that the learned judge, having the benefit of hearing all the witnesses and examining all the documents before him in the lengthy trial, which spanned over the period from 1 October 2012 to 23 May 2016, had fully appreciated the facts, the evidence and law. We are of the considered opinion that the learned judge had independently made his own analysis of the evidence, arrived at his own findings, and then made his decision and orders on each issue for trial based on the law. The learned judge was more convinced by the evidence adduced by the plaintiffs' witnesses, whom he found to be more credible. He found that the defendants' witnesses, in particular the first defendant, Hamzah and Dinesh, were untruthful and lacked credibility. He therefore held that the plaintiffs have proved their case. We agree with decided cases that it is not a good practice for the learned judge to copy and/or adopt more of one party's submissions, but that cannot be the basis to impugn and strike down the whole judgment. On the whole, from a careful perusal of the judgment, we are satisfied that the learned judge did apply his mind objectively to the case before him, and there was no lack of judicial appreciation, or any judicial misappreciation of the facts and the law. We find that the learned judge was not plainly wrong, and thus we hold that the judgment is valid and ought to be preserved.

**Reliefs To Be Granted**

**[124]** We agree with the submissions of the defendants that the learned judge did not grant the reliefs sought by the plaintiffs. What the plaintiffs had prayed for in Suit 228 can be summarised as follows:

(i) removal of the first and second defendants as trustees of the Trust, and replacing them with HSBC trustee as the trustee;

(ii) various injunctive reliefs against the first and second defendants;

(iii) statement of accounts to be furnished by the first and fourth defendants in respect of the sum of RM16,554,111.92 compensation paid by the Johor State Government and thereafter payment of all sums due on the taking of the accounts;

(iv) statement of accounts to be furnished by the first and second defendants in respect of the sum of RM22,000,000 compensation paid by the Johor State Government, and thereafter payment of all sums due on the taking of the accounts.

(v) the third defendant to furnish an account of all monies paid out to him by the first and/or fourth defendants;

(vii) damages (including special damages) and costs on an indemnity basis as against defendants.

**[125]** However, the learned judge granted orders and declarations which altered, varied, and/or amended the reliefs sought which are different from what were prayed for by the plaintiffs. The defendants contended that the High Court had no jurisdiction to grant any relief to the plaintiffs that have not been specifically pleaded.

**[126]** A glaring instance would be the extensive declarations made by the learned judge on the liability and obligations of the various defendants, including Dinesh, in paragraphs (a) to (k) of the order dated 22 December 2016 (pp. 10 and 11). Furthermore, in paragraphs (l) to (r), the learned judge ordered various sums of money to be paid by the various defendants, including Dinesh.

**[127]** Learned counsel for the plaintiffs submitted that the learned judge could grant those reliefs which have not been pleaded under the omnibus clause at the end of the plaintiffs' prayers which prayed for:

> Further or other relief
>
> (v) such further and/or other relief deemed fit and appropriate by this Honourable Court to so grant.

**[128]** Here, both parties submitted comparative tables to show where the learned judge had been consistent with, or had departed from the pleadings.

**[129]** After examining the reliefs prayed for by the plaintiffs, and the reliefs granted by the learned judge, we are of the view that indeed the learned judge had departed from the pleaded reliefs and had given other reliefs which he thought appropriate.

**[130]** Learned counsel for the plaintiffs submitted that the findings of the learned judge are in accord with the pleadings, and the reliefs granted are consistent with the pleaded case and are covered by the facts and issues in the pleadings. The court also has the jurisdiction to mould relief under prayer (y) of the amended statement of claim in accordance with the suitability and justice of the case, as well as the findings of the court and the evidence led. There is an abundance of case law on the court's power to mould relief.

**[131]** In *Ritz Garden Hotel (Cameron Highlands) Sdn Bhd v. Balakrishan Kaliannan* [2013] 7 CLJ 413; [2013] 6 MLJ 149, the Federal Court at pp. 424-425 (CLJ); p. 158 (MLJ) stated:

> [19] Lastly it was submitted (by the plaintiff) that the term 'proceeding' in s. 11 of the Civil Law Act 1956 should not be narrowly interpreted. The term must be defined to include the whole gamut from pleadings to judgment. *The judgment finally determined what the nature of the proceeding was regardless of what labels or categories the parties put up. The relief or remedy that a judge orders may be different from what the parties asked but that remedy is what defines the proceeding* …

...

*[21] With respect I am unable to agree with the contention by the defendant that the proceeding tried in the High Court was not for the recovery of any debt or damages, as the remedies sought by the plaintiff were for rescission of the agreement, for the deposit of RM250,000 to be forfeited, for rectification of the land register and for damages. It is to be noted that in prayer (G) of his statement of claim the plaintiff prayed for 'Lain-lain dan/atau apa-apa relif dan/atau perintah berlainan atau berlanjutan yang Mahkamah Yang Mulia ini fikirkan suai dan manfaat'. (Any other or further relief or order which this Honourable court deems fit): This omnibus prayer must not be treated as a mere ornament to pleadings devoid of any meaning* (see *Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156. In *Tan Tek Seng v. Suruhnjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261 Gopal Sri Ram JCA at p. 301 said:

> In his statement of claim, the appellant has also prayed for 'further or other relief as this honourable court thinks fit'. In *Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156 at p 160, a prayer in a statement of claim reads' Any other relief which this Honourable court deems fit to grant'. Salleh Abas FJ (as he then was) said that this prayer 'must not be treated as a mere ornament to pleadings devoid of any meaning'.

I am of the view that the same may be said of the like prayer in the present case. **This court should, in my judgment, award the appellant such relief as is appropriate in the circumstances of the case**." (emphasis added)

**[132]** In *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771, the Court of Appeal at pp. 814 – 815 further stated:

> As it happens, there is, in the present case, no inconsistency between the relief which I propose to award to the appellant and the other relief he has expressly claimed. For that reason, I abstain from deciding this case upon my own view of the wider role which, **I believe, courts should play in moulding relief to suit the justice of a particular case**, especially in the field of public law. (emphasis added)

**[133]** As for the declaratory reliefs, learned counsel for the plaintiffs submitted that the court's power to grant declaratory judgments, being a discretionary and equitable remedy, is not subject to reliefs claimed by the parties but rather based on the circumstances of the case, provided that the party seeking the same pleads the omnibus prayer and the basis of the reliefs are sufficiently supported by the facts and issues in the pleaded case.

**[134]** Learned counsel for Dinesh relied on the Federal Court case of *Shirley Kathreyn Yap v. Malcolm Thwaites* [2016] 8 CLJ 765 where at p. 780, Md Raus Shariff PCA (as he then was) stated:

> As stated earlier, the plaintiff's pleaded case is for an accounting order. However, the plaintiff at the end of the trial abandoned his prayer for an accounting. This can be seen from the trial judge ground of judgment which reads:

> At the conclusion of the trial, the plaintiff abandoned his prayer in paragraph 60(a) of his ASOC for an accounting of income generated from the various horse racing partnership which was received by the defendants as trustee for the plaintiff as the registered manager and nominee of the plaintiff.
>
> [51] Under such circumstances, we are of the view that the trial judge after having found that the plaintiff had abandoned his prayer for an accounting, ought to have dismissed the plaintiff's claim. There was no cause of action left.

**[135]** We agree with the submissions of learned counsel for the plaintiffs that the present case can be distinguished. In *Shirley (supra)*, at the end of the trial, the plaintiff had abandoned his prayer for an accounting order. However, in the present case, the plaintiffs have never abandoned their prayer for audited accounts to be produced. As such, the plaintiffs' claim ought not to be dismissed.

**[136]** We note that the reliefs granted by the learned judge are inconsistent with the reliefs prayed for. From the opening statement of the plaintiffs' counsel at the commencement of the trial at the High Court, it is clear that the plaintiffs seek mainly for audited accounts to be submitted by the defendants to the plaintiffs, and if there is found any sums to be paid, then such payment have to be made.

**[137]** We further note that instead of appointing HSBC trustee as the trustee to take over from the R & M, as prayed for by the plaintiffs, the learned judge ordered that the R & M continues in carrying out its responsibilities until application is made by the R & M and/or the plaintiffs for the R & M to be discharged.

**[138]** We are also of the view that the order of the learned judge in ordering various specific sums to be paid by various defendants to the plaintiffs is inconsistent with the plaintiffs' primary prayer for audited accounts to be submitted by the defendants. It would therefore be premature for such sums to be paid even before the audited accounts are submitted. There would be a possibility that inaccurate sums of money would be paid without a proper audit.

**[139]** In our opinion, while the learned judge's findings on liability are correct, the learned judge ought not to have granted the varied reliefs. We take into consideration the submissions of learned counsel for the appellants, and learned counsel for the 26th plaintiff, for the order of the High Court to be substituted with an order for audited accounts to be submitted, and for HSBC trustees to be appointed to replace the R & M.

## Decision

**[140]** Having heard the submissions of respective learned counsel, and perused the records of appeal, we make the following unanimous decision:

(i) as stated earlier in para. 58 of this judgment, Appeal 220 is allowed with costs. The decision and order of the High Court in respect of the second and third defendants and/or their estate are set aside;

(ii) the two appeals in Appeal 219 and Appeal 221, on liability, are dismissed with costs. However, the two appeals in respect of the reliefs to be granted are allowed in part. The orders of the High Court are set aside and substituted with orders which are prayed for in para. 83.3F of the amended statement of claim with the following modifications or exceptions:

(a) all references to the liability of the second and third defendants are to be deleted;

(b) the appointment of HSBC trustee to replace the R & M would be effective two months from the date of this order. In the event that HSBC trustee declines the appointment, the plaintiffs shall have liberty to apply to the High Court for an alternative trustee to be appointed. The R & M shall hand over all matters to HSBC trustee, or the alternative trustee to be appointed by the court, within three months from the date of this order;

(c) since Folks is not an auditing company and would not be able to serve as an auditor, HSBC trustee, or the alternative trustee to be appointed by the court, shall appoint an independent auditor which has been approved by the court;

(d) regarding prayer (q), the 30 days is substituted with six months from the date of this order. Liberty to apply;

(e) prayer (v) for special damages is not allowed;

(f) prayer (w) is allowed;

(g) prayer (x) on damages is allowed subject to the specific sums being identified and confirmed after the audited accounts have been submitted to HSBC trustee, or the alternative trustee to be appointed by the court;

(h) prayer (y): the order on costs awarded by the High Court is affirmed.

*Further Order Of This Court*

**[141]** Upon the audited accounts being submitted to HSBC trustee, or the alternative trustee to be appointed by the court, and where it is found that certain payments are to be made by the first defendant and/or the fourth defendant, upon any demand made by HSBC trustee, or the alternative

A trustee to be appointed by the court, for such sums to be paid, the first defendant and/or fourth defendant are, pursuant to this order, ordered to pay such sums forthwith to the Trust. In this respect, we place on record the undertaking of Dinesh and the fourth defendant made in their submissions that should this court, instead of the reliefs granted by the learned High Court
B Judge, order that audited accounts be submitted to HSBC trustee, or the alternative trustee to be appointed by the court, they undertake to make all payments found owing or due to the Trust.

*Costs*

C Appeal 220

**[142]** Costs of RM20,000 are to be paid by the respondents to the appellants, subject to payment of the allocator fee.

Appeal 219 and Appeal 221

D **[143]** Costs of RM50,000 for each appeal are to be paid by the respective appellant to the respondents, subject to payment of the allocator fee.

*Deposit*

**[144]** All deposits are to be refunded.

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